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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1418.

ISABELLA LEE, BY HER NEXT FRIEND, GIDEON LEE, APPELLANT,

vs.

RICHARD W. SIMPSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED OCTOBER 18, 1889.

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1 THE UNITED STATES OF AMERICA, } *To wit:*
District of South Carolina, }

At a circuit court of the United States for the fourth circuit in and for the district aforesaid, begun and holden at Charleston, in the district aforesaid, on the first Monday in April, A. D. 1889, before the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the Honorable Hugh L. Bond, circuit judge, and the Honorable Charles H. Simonton, district judge, holding said circuit court according to the form of the act of Congress in such case made and provided, the following proceedings were had:

ISABELLA LEE, a Citizen of the State of New York, an Infant, by Her Next Friend, Gideon Lee, a Citizen of the State of New York, Complainant,

against

RICHARD W. SIMPSON, a Citizen of the State of South Carolina, Defendant.

2 Be it remembered that heretofore, to wit, on the 26th day of November, A. D. 1888, appeared the said complainant, Isabella Lee, in the aforesaid circuit court and filed a petition for the appointment of a next friend; which petition is in the words and tenor following:

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

Ex parte ISABELLA LEE.

Petition for the Appointment of Next Friend.

To the honorable the judges of the United States circuit court for the district of South Carolina:

The petition of Isabella Lee, an infant, respectfully shows to the court—

I. That she is an infant over the age of fourteen years, to wit, of the age of eighteen years.

II. That she is advised that she has an interest in land situate in the county of Oconee, in the State of South Carolina, of the value of over two thousand dollars, being an interest as remainderman

3 in the plantation known as Fort Hill, measuring and containing eleven hundred and ten acres, of which plantation a part consisting of eight hundred and fourteen acres was conveyed to Thomas G. Clemson, in trust, and was held by him and those claiming under him under the trusts contained in the will of Mrs. Floride Calhoun, and also in certain personal property described in the last will and testament and codicil thereto of the said Mrs. Floride Calhoun, and which said real and personal property is now

in possession of Richard W. Simpson, a citizen of South Carolina, and your petitioner is desirous of bringing a suit or suits in equity to assert her rights in the premises.

III. That your petitioner resides with her father, Gideon Lee, at Carmel, in the State of New York, and that the said Gideon Lee was duly appointed her general guardian, and has no interest antagonistic to your petitioner in the said property.

4 IV. That the said Gideon Lee is a proper person to be appointed her next friend to bring the said suit or suits in equity.

Wherefore she prays that her father, Gideon Lee, be appointed her next friend to bring the said suit or suits in equity.

ISABELLA LEE.

STATE OF NEW YORK, }
County of ——. }

Personally appeared before me Isabella Lee, the petitioner above named, and after being duly sworn says that the foregoing petition is true to her own knowledge, except as to those matters therein stated on information and belief, and those she believes to be true.

ISABELLA LEE.

Sworn to before me this 21st day of Nov'r, 1888.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year last aforesaid.

[SEAL.] GEO. H. CORRY,
Commissioner for the State of South Carolina.

Office, 60 Wall street, N. Y.

Endorsed: Filed 26 Nov'r, 1888.

5 On the same day, to wit, the 26th of November, 1888, the following order was passed:

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

Ex parte ISABELLA LEE.

On hearing the sworn petition of Isabella Lee for the appointment of Gideon Lee, her father and general guardian, as her next friend to bring suit or suits in equity against Richard W. Simpson in relation to her interest in the plantation in Oconee county, South Carolina, known as Fort Hill, and in relation to her interest in the property or connected with the property devised and bequeathed by the will of Mrs. Floride Calhoun, now, on motion of J. P Carey and the affidavit of J. P. Carey accompanying the same, it is ordered that the prayer of the petitioner be granted and that the said Gideon Lee be appointed such next friend.

CHARLES H. SIMONTON, *U. S. Judge.*

26th Nov., 1888.

6 And on the same day, to wit, the 26th day of November, 1888, came into the court Isabella Lee, by her next friend, Gideon Lee, and through her solicitors, James P. Carey and Bachman and Youmans, filed a bill for injunction, account, to declare trusts, and relief, which bill is in the words and tenor following:

7 *Bill.*

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court. In Equity.

ISABELLA LEE, a Citizen of the State of New York, an Infant, by Her Next Friend, Gideon Lee, a Citizen of the State of New York, Complainant,

against

RICHARD W. SIMPSON, a Citizen of the State of South Carolina, Defendant.

To the honorable the judges of the circuit court of the United States for the district of South Carolina:

Isabella Lee, a citizen of the State of New York, infant, by her guardian and next friend, Gideon Lee, a citizen of the State of New York, brings this her bill of complaint against Richard W. Simpson, a citizen of the State of South Carolina.

And thereupon your oratrix complains and says—

That on and before the thirteenth day of May, in the year of our Lord one thousand eight hundred and fifty-four, Floride Calhoun was seized and possessed of all that plantation or tract of land situate, lying, and being in that part of Pickens district, which is now Oconee county, in the State of South Carolina, on the east
8 side of Seneca river, known as the Fort Hill place, containing eleven hundred and ten acres, more or less, adjoining lands of Andrew Lewis, James Crawford, and others and having such form and marks as a plat made by M. S. McRay, deputy surveyor, on March 7th, A. D. 1853, represents.

And your oratrix further showeth unto your honors that on the said thirteenth day of May, in the year of our Lord one thousand eight hundred and fifty-four, the said Floride Calhoun and her daughter, Cornelia M. Calhoun, sold and conveyed the said plantation or tract of land, together with certain negro slaves and other personalty, to Andrew P. Calhoun for the sum of forty-nine thousand dollars (the said Cornelia M. Calhoun having no interest whatever in the real estate so sold and conveyed), all of which will more fully appear by reference to the said deed of conveyance, with copy of said plat annexed, recorded in the office of the register of mesne conveyance, in Book G, page 452, Pickens district.

And your oratrix further showeth unto your honors that on the same day the said Andrew P. Calhoun duly executed his certain bond, under seal, to the said Floride Calhoun and Cornelia M. Cal-

houn, conditioned for the payment of forty thousand two hundred dollars to Floride Calhoun and the remaining eight thousand two hundred dollars to Cornelia M Calhoun, and to secure the payment of the said bond representing the purchase-money, and as a part of the same transaction at the same time duly executed and delivered to the said Floride Calhoun and Cornelia M. Calhoun his certain conveyance, by way of mortgage, and thereby granted, bargained, sold, and released the said plantation or tract of land, known as the Fort Hill place, upon the condition that if the said Andrew P. Calhoun should well and truly pay or cause to be paid the said sums of money in the said bond mentioned to be paid according to the true intent and meaning thereof the said conveyance should be null and void, otherwise to remain in full force and virtue; which said mortgage was duly recorded in the office of the register of mesne conveyance for Pickens district, in Book G, page 450.

9 And your oratrix further showeth unto your honors that thereafter, on the 27th day of June, A. D. 1863, the said Floride Calhoun duly made, published, and declared her last will and testament, in writing, wherein and whereby, among other things, she devised and bequeathed as follows:

"Second. To my daughter Anna Mariah, wife of Thomas G Clemson, of Maryland, I give, devise, and bequeath during her life, and for her sole and separate use, the following property: My house and lot in Pendleton, and the land attached and belonging thereto, purchased by me from William Adger, together with the furniture and everything in the house and upon the premises, reserving, however, the silver and such other articles as I may hereinafter specifically give to others; also all my jewelry and the silver cross and prayer book presented to me by the church at Newport, Rhode Island. At Anna's death I devise and bequeath all the above-mentioned property to her daughter, Floride Elizabeth Clemson, and at the death of Floride, if she dies without issue, I devise and bequeath it to my sons, John and William's, children, then living, equally among them; or, if they be dead, to their issue then living.

"I am possessed still of a large residue of property, consisting principally of a debt due me by my son Andrew, for the purchase of Fort Hill, amounting to about forty thousand two hundred dollars, secured to me by bond and mortgage. I have also an unreserved interest in a gold mine in Dalonega, Georgia, belonging to the estate of my late husband, and also an interest in the estate of my deceased son Patrick and deceased daughter Cornelia, besides other property. Whatever real or personal property I may possess at my death, and not hereinbefore specifically or otherwise disposed of, I direct my executors to sell whenever they shall deem it advisable. I direct my executors to collect, as fast as possible, the above-mentioned residue of my estate, and after paying off my debts and the legacy to Calhoun Clemson the remainder I wish divided into four parts, which I dispose of as follows:

20. "One part, being the fourth of the above residue, I give and bequeath to my daughter Anna during her life and for her sole and separate use, and at her death I will and bequeath it to her

10 daughter Floride, and at Floride's death, if she die without issue, I will and bequeath it to the children of my deceased sons, John and William, then living equally among them or to their issue if they be dead, issue to represent the parents. The better to effect my intentions in regard to the property in this and in the second clause given to Anna I appoint Edward Noble, of Abbeville, trustee for it and vest in him the legal title. Should Anna at any time wish to sell the house and lands in Pendleton or all or any portion of the property given to her for life, the trustee, provided it meets with his approval, is authorized to dispose of it according to the wishes of my daughter upon having her written request for so doing. The proceeds of such sale the trustee shall hold subject to the trusts and limitations declared in reference to the original property. The trustee is authorized and required to invest the proceeds and also the fourth part of the residue herein given to her in such property or in such way as she may in writing direct, provided it meets with his approval. The trustee is authorized and required from time to time to change such investments as often as he may be directed so to do by my said daughter in writing, provided it meets with his approval, holding always the substituted property or reinvestments subject to the trusts and limitations aforesaid. If from death or any cause there is no trustee or if Anna at any time shall desire to change her trustee she shall have the power so to do and to appoint another by any instrument in writing under seal executed by her in the presence of two subscribing witnesses; and as often as she may desire to change her trustee she shall have the power so to do by observing the form and solemnity above described."

"21. One-fourth part of said residue of my said estate I give and bequeath to my granddaughter, Floride Elizabeth Clemson; but if Floride should die without living issue I give and bequeath it at her death to the children of my sons, John and William, or the issue of them if they be dead, the issue to take by representation.

22. The remaining two-fourths I dispose of as follows: To Kate P. Calhoun, my daughter-in-law, I give and bequeath the one-half of the one-fourth of said residue of my estate to be enjoyed by

11 her during widowhood. At her death or marriage, whichever first happens, I give and bequeath the same to such of her children, being my grandchildren, as may then be alive. But should either of my said grandchildren die under twenty-one years of age leaving no child or children the share of such deceasing grandchild shall go to the survivors or survivor of them or their issue, the issue representing the parent. If Kate should die before me what I have given her in the will is not to revert to my estate, but is to go to her children, my grandchildren, living at my death, subject to the conditions and limitations above expressed.

23. The remaining fourth and half of a fourth of the above said *residence* of my estate I give and bequeath to my grandsons, John C. Calhoun and Benjamin A. P. Calhoun, sons of my deceased son John, and William Lowndes Calhoun, child of my deceased son William, equally among them, and should either of them die under

twenty-one years of age leaving no issue the share of such deceasing child shall go to the survivor or survivors."

Your oratrix further showeth unto your honors that on the 22nd day of January, A. D. 1866, the said Floride Calhoun duly made, published, and declared a codicil to her said last will and testament, wherein, among other things, she revoked the devise of the real property in Pendleton made to Anna Clemson in the second paragraph of said last will and testament, and devised the same to other persons, and devised as follows:

2. "By the nineteenth clause of the will I directed the said bond debt on my deceased son Andrew secured by mortgage on Fort Hill, together with all other property possessed by me and not before disposed of, to be collected by my executors, and the proceeds to be divided into four parts. One part I gave to Anna, one part to her daughter Floride, and the two other parts to Kate and her children, as will appear by clauses 20, 21, 22, and 23 of the will. I desire now to change the disposition of the said bond and mortgage debt, and do now give and bequeath it in the following manner: Three-fourths of my interest in said bond and mortgage debt, amounting to about forty thousand dollars, two hundred dollars I hereby
12 give and bequeath to my daughter, Anna M. Clemson, to be enjoyed by her under clause twenty of the will, and according to the provisions of that clause to vest in the same trustee and to be subject to all the powers, trusts, conditions, and limitations of that clause precisely as the bequests therein made were subject to them, with this exception and alteration, that my daughter Anna is hereby authorized and empowered by her last will and testament, duly executed by her, to dispose of this bequest of three-fourths of said bond and mortgage debt as she pleases. If she does not thus dispose of it at her death, I give and bequeath it, the said three-fourths, to her daughter Floride, and should the said Floride die without leaving issue I give and bequeath it at her death to her brother, Calhoun Clemson; but, nevertheless, Floride shall likewise have power to dispose of it at her death as she pleases by a last will and testament duly executed by her.

By clause 2nd of the will I give the furniture and every article of the property in my house in Pendleton and upon the premises, with certain reservations, and also my jewelry and some other small articles to my said daughter Anna. I now confirm to her the bequests of aforesaid furniture and all other personal property embraced in said 2nd clause, which it is my will that she shall enjoy for life as her sole and separate estate, and at her death I give and bequeath all this personal property to her daughter Floride absolutely. To Anna I also give and bequeath the oil portrait of my mother, which by clause 5 of the will was given to my daughter-in-law Kate.

3. The remaining one-fourth part of my interest in said bond and mortgage debt against the estate of my deceased son Andrew I give and bequeath to Floride Elizabeth Clemson, my granddaughter, but if she dies without leaving issue I give and bequeath it to her brother, Calhoun Clemson. She, nevertheless, is hereby authorized

and empowered to dispose of said fourth part as she pleases by her last will and testament duly executed.

4. Should my granddaughter Floride's death occur before mine, what I have given her in the will and codicil shall not fall into the residue of my estate, but I give and bequeath it to her
13 mother, my daughter Anna, who shall take it, subject to all the trusts, powers, conditions, and limitations imposed upon the direct bequest to her; and should my daughter Anna's death occur before mine, what I have given her in the second clause of the will and codicil shall not fall into the residue of my estate, but I give and bequeath the same to her daughter Floride, who shall take and enjoy it, as her mother would have done if living, subject to the same trusts, powers, conditions, and limitations; and should both Anna and Floride die before me, what has been given them in the several clauses of the will and codicil shall not fall into the said residue, but I give and bequeath the whole to my grandson, John Calhoun Clemson.

5. Should I at any time collect the aforesaid bond and mortgage debt or any part of it, or should Fort Hill be purchased with it, or the money be invested in any other property, or be retained in hand, the property then purchased, the property thus obtained by investment, and the money thus retained shall be considered and held to be in place of and the same as the aforesaid bond and mortgage and shall pass under this codicil as if the same were still in the form of said bond and mortgage—that is to say, shall pass to my daughter Anna and granddaughter Floride, as aforesaid bond and mortgage debt is directed to be divided between them."

And your oratrix further showeth unto your honors that on the 12th day of March, A. D. 1866, the said Floride Calhoun and one Thomas C. Clemson (to whom letters of administration had been granted on the — day of February, A. D. 1866, on the personal estate of the said Cornelia M. Calhoun, who had departed this life intestate and unmarried on the — day of ——, A. D. 1856), as administrator of the personal estate of the said Cornelia M. Calhoun, exhibited their bill in the court of equity for the district of Pickens, State of South Carolina, against the said Andrew P. Calhoun and others for the foreclosure of the said mortgage of the said plantation or tract of land known as the Fort Hill place, executed to secure payment of the bond aforesaid, and for the sale of said plantation for that purpose; and at the July term, A. D. 1866, of the said court a decree was made whereby it was adjudged that the said
14 mortgage be foreclosed and the said mortgage realty sued, which decree on appeal was affirmed by the supreme court of the State of South Carolina and the cause remanded to the circuit court for further proceedings in accordance therewith, all of which more fully appears in reference to the said proceedings of record.

And your oratrix further showeth unto your honors that during the pendency of said suit, to wit, on the 25th day of July, A. D. 1866, the said Floride Calhoun departed this life, leaving in full force her said last will and testament as modified by the codicil aforesaid; and thereafter, on the 7th day of August, A. D. 1866, the said last

will and testament and codicil thereto were duly admitted to probate before Robert Junkin, Esquire, ordinary of Anderson district, in said State; and Edward Noble, one of the persons mentioned as executors therein, duly qualified as executor of said will and testament and codicil thereto on the same day and took upon himself the burthen of the execution thereof and accepted and assumed the trusts thereby imposed upon him.

And your oratrix further showeth unto your honors that thereafter, to wit, on the — day of ——, A. D. 18—, the said Floride Elizabeth Clemson intermarried with Gideon Lee, of the State of New York; and your oratrix, Isabella Lee, is the only child of the said marriage; and thereafter, to wit, on the 27th day of August, A. D. 1871, the said Floride Elizabeth Lee, formerly Clemson, departed this life intestate, leaving surviving her as her sole heirs-at-law and distributees her husband, Gideon Lee, and her daughter, Isabella Lee, your oratrix.

And your oratrix is informed and believes and so charges that the property so devised for the use of her mother under the said last will and testament and codicil of said Floride Calhoun, deceased, passed to your oratrix under the provisions thereof.

And your oratrix further showeth unto your honors that after the death of the said Floride Calhoun the said cause in equity was continued by Edward Noble, executor as aforesaid, and Thomas G. Clemson, administrator as aforesaid, and on the 14th day of July, A. D. 1871, an order was made by the circuit court for the
15 sale of said plantation on sales-day, in January, A. D. 1872, on which last-mentioned day a sale under said order was made of said plantation to Thomas G. Clemson, as trustee for his wife, the said Anna M. Clemson, under the last will and testament and codicil of the said Floride Calhoun, the said Thomas G. Clemson having been substituted as said trustee in the lieu and stead of the said Edward Noble, and on the second day of March, A. D. 1872, an order was made by the circuit court confirming said sale and directing title to the plantation to be made to Thomas G. Clemson, trustee as aforesaid, and on the 9th day of June, A. D. 1875, still another order was made again, directing said title to be made to said Thomas G. Clemson, trustee as aforesaid, and on June 10, 1875, title was accordingly made of said plantation to Thomas G. Clemson, trustee as aforesaid, in consideration of the premises, which were a recital of the proceedings in the case, and the nominal consideration usually inserted in deeds of three dollars, no money having been paid and no cash having been paid into court or the hands of its officers except the costs, which said title deed was duly recorded in the office of register of mesne conveyance for Oconee county, State of South Carolina, May 11th, A. D. 1876, and the said plantation thus taken in part payment of the said debt was held continuously up to the time of his death by the said Thomas G. Clemson, as trustee, under the trusts aforesaid, of the last will and testament and codicil thereto of the said Floride Calhoun.

And your oratrix further showeth unto your honors that thereafter your oratrix being then entitled to hold one-fourth of the said

plantation in fee simple absolute under the last will and testament and codicil thereto of the said Floride Calhoun, and the said Anna M. Clemson being entitled to hold a life estate in three-fourths of said plantation for her sole and separate use, with remainder to your oratrix upon the death of the said Anna M. Clemson, in case the said Anna M. Clemson did not exercise the power of appointment by her last will and testament as provided by the last will and testament and codicil thereto of the said Floride Calhoun, Gideon Lee,
16 acting for your oratrix, an infant of very tender years, and Thomas B. Clemson, as trustee, under the last will and testament and codicil thereto of Floride Calhoun, on the — day of ——, A. D. 18—, made an informal partition of the said plantation, and thereafter your oratrix has been in possession of about three hundred acres of the said plantation, and the remaining part of the said plantation, consisting of about eight hundred and fourteen acres, has been in possession of the said Thomas G. Clemson, a citizen of the State of South Carolina, up to the time of his death, and since his death it has been in the possession of Richard W. Simpson, a citizen of the State of South Carolina, claiming under the said Thomas G. Clemson, trustee, under last will and testament of the said Floride Calhoun.

Your oratrix further showeth unto your honors that the said Anna M. Clemson departed this life on the 27th day of September, A. D. 1875, without having exercised the power of appointment conferred upon her by the last will and testament and codicil thereto of the said Floride Calhoun, and that thereupon your oratrix became entitled to said three-fourths of the said plantation then in possession of the said Thomas G. Clemson, as trustee aforesaid, in fee simple absolute, and from the said time your oratrix is entitled to the rents, issues, income, and profits of the said part of said plantation.

And your oratrix further showeth unto your honors that the said Thomas G. Clemson remained in possession of the said part of the said plantation, subject to the trusts of the said last will and testament and codicil thereto of the said Floride Calhoun, from the time of the death of the said Anna M. Clemson until the 6th day of April, A. D. 1888, on which day he departed this life, leaving your oratrix his sole heir-at-law, during the whole of which time he collected the income, rents, issues, and profits of the said plantation, which, as your oratrix is informed and believes, were reasonably of the value of two thousand five hundred dollars per annum, amounting in the aggregate to over thirty-one thousand dollars, without including interest.

Your oratrix further showeth unto your honors that since the
17 death of the said Thomas G. Clemson the defendant, Richard W. Simpson, has in some manner, claiming under the said Thomas G. Clemson, acquired possession of the said part of the said plantation, containing eight hundred and fourteen acres, formerly held by the said Thomas G. Clemson, as trustee as aforesaid, and of the accumulated income, rents, issues, and profits thereof, without having been appointed in any manner trustee under

the last will and testament and the codicil thereto of the said Floride Calhoun, and is now in the possession of the same and has received the income, rents, issues, and profits of the said part of said plantation since the death of the said Thomas G. Clemson.

And your oratrix further showeth unto your honors that the said Thomas G. Clemson never accounted in his lifetime for the accumulated income, rents, issues, and profits of the said part of the said plantation arising since the death of the said Anna M. Clemson or for any part thereof, nor has the said Richard W. Simpson, since the death of the said Thomas G. Clemson, accounted therefor, nor has he accounted to your oratrix for the income, rents, issues, and profits of the same while he has been in possession thereof, nor has he delivered up possession of the said part of the said plantation, although often requested so to do and as in justice and equity he ought to have done; and the said Richard W. Simpson also neglects and refuses to acknowledge that the said Thomas G. Clemson, under whom he claims, held the said part of the said plantation and the income, rents, issues, and profits thereof as trustee under the last will and testament and codicil thereto of the said Floride Calhoun.

And your oratrix is informed and believes and so charges that the said Richard W. Simpson intends and is about to make and execute a deed or deeds of the said eight hundred and fourteen acres of the said plantation and the accumulated income, rents, issues, and profits thereof to uses and purposes which will wholly defeat her rights in the premises, as hereinbefore asserted; all which actings and doings of the said defendant are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your oratrix in the premises.

In tender consideration whereof and forasmuch as your or-
18 atrix is remediless in the premises and can have full, complete, and adequate relief only in a court of equity, where matters of this sort are properly cognizable and relievable, to the end, therefore, that the said Richard W. Simpson may, if he can, show why your oratrix should not have the relief hereby prayed and may, according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to the statements and allegations, each and every of them, contained in this bill of complaint as if he were specially and particularly interrogated thereto (answer on oath being waived); especially that he, the said Richard W. Simpson, the defendant, may answer the following, as required by the note hereunder written:

First. Whether the title to the eight hundred and fourteen acres of land, part of the plantation known as the Fort Hill place, is not correctly set forth in this bill of complaint; and, if incorrectly set forth, answer fully, perspicuously, and at large in what particulars it is incorrectly set forth.

Second. Whether Thomas G. Clemson went into the possession of the said eight hundred and fourteen acres of land as trustee under the trusts contained in the last will and testament and codicil thereto of Floride Calhoun. If not, how and in what manner did he go into possession thereof?

Third. Whether the said Anna M. Clemson died without executing the power of appointment by her last will and testament (if she made any last will and testament) conferred on her by the last will and testament and codicil thereto of Floride Calhoun, and, if it is claimed that she executed said power, show particularly how and in what means she did so.

Fourth. Whether the said eight hundred and fourteen acres of land are not of the value of twenty-five thousand dollars; and, if not of that value, of what value.

Fifth. Whether the incomes, rents, issues, and profits of the said eight hundred and fourteen acres since the death of Anna M. Clemson were not received and retained by Thomas G. Clemson.

Sixth. Whether the said eight hundred and fourteen acres are not now and have not been since the death of Thomas G. Clem-
19 son in the possession of Richard W. Simpson, and whether he has not collected the income, rents, issues, and profits thereof.

Seventh. Whether he, the said Richard W. Simpson, does not intend to convey and whether he will not, unless arrested by judicial process, convey the said plantation and the income, rents, issues, and profits thereof to uses and purposes which will defeat the rights of your oratrix herein?

Eighth. Whether he does not contemplate, in certain contingencies possible to arise, conveying such property as Thomas G. Clemson died in possession of, and which has since the death of said Thomas G. Clemson come into the possession of him, the said Richard W. Simpson, to such uses and purposes as would prevent the demands of your oratrix hereinbefore asserted being satisfied out of such property?

And that the defendant, Richard W. Simpson, may come to a fair and just account of the income, rents, issues, and profits of the said eight hundred and fourteen acres of land which came into his possession by, through, or under the former trustee, Thomas G. Clemson, as aforesaid, and which have been collected by him since he came into the possession of the said trust property; that the trusts whereon the said Thomas G. Clemson held the said property known as the Fort Hill place be declared and that the cloud upon the title of your oratrix to the said property be removed by the judgment and decree of this court, and that your oratrix be adjudged to hold the said plantation known as the Fort Hill place as the same was originally described in fee simple absolute; that the said Richard W. Simpson may account for the personal property in which Anna W. Clemson had a life estate and in which your oratrix has an estate in remainder or otherwise which came into his possession, and that the said Richard W. Simpson may be enjoined and restrained from making any deed or deeds of the said plantation or any part thereof or any of the property which said Clemson died possessed of to any uses or trusts which will in any manner tend to cloud the title of your oratrix or in any manner defeat her rights in the premises as hereinbefore asserted; and that your oratrix may

have such other and further relief in the premises as the
20 nature of her case shall require and to your honors shall seem meet and agreeable to equity and good conscience.

May it please your honors to grant unto your oratrix not only your most gracious writ or writs of injunction of the United States of America issuing out of and under the seal of this honorable court, to be directed to the said Richard W. Simpson, to restrain him from making and executing any deed or deeds of the plantation known as Fort Hill or any part thereof, to any uses or purposes which will cloud the title of your oratrix or in any manner tend to defeat her rights in the premises, or from assigning or transferring any of the accumulated income, rents, issues, and profits of said plantation, but also your most gracious writ of subpœna of the United States of America, to be directed to the said Richard W. Simpson, thereby commanding him, at a certain day and under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet; and your oratrix shall ever pray, &c.

The defendant is required to answer the interrogatories numbered, respectively, first, second, third, fourth, fifth, sixth, seventh, and eighth.

J. P. CAREY,
Complainant's Solicitor.
BUCHANAN & YOUMANS,
Of Counsel.

Endorsed: Filed 26th Nov'r, 1888.

21 On the 26th day of November, A. D. 1888, came into court the complainant, by her attorney, and filed the following affidavit of James P. Carey:

Affidavit.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

Ex parte ISABELLA LEE.

Petition for appointment of Gideon Lee as her next friend.

Personally appeared before me J. P. Carey, who on oath says that Isabella Lee is a citizen of the State of New York; that Gideon Lee is a citizen of the State of New York, and that Richard W. Simpson is a citizen of the State of South Carolina.

JAMES P. CAREY.

Sworn to before me November 26th, 1888.
J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Endorsed: Filed 26 Nov'r, 1888.

22 And on the same day, to wit, the 26th day of November, A. D. 1888, the following *subpœna ad respondendum* was issued:

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina:

The President of the United States of America to Richard W. Simpson, a citizen of the State of South Carolina:

You are hereby strictly commanded and firmly enjoined, that all manner of excuses being laid aside, you be and appear before the judges of the circuit court of the United States for the district of South Carolina, at Charleston, on the first rule day, twenty days after the service thereof, then and there true and perfect answer to make, upon your corporal oath on the Holy Evangelists, to all such matters as shall be objected against you in the bill of complaint of Isabella Lee, an infant, a citizen of the State of New York, who sues, by her next friend, Gideon Lee, a citizen of New York.

And also that you do, on the rule day next immediately
23 after the day appointed and expressed, file or caused to be filed in the registry of said court your plea, answer, or demurrer to the said bill of complaint.

Hereof fail not under the pain of one hundred pounds.

Given under the seal of the said court.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, at Charleston, in South Carolina district aforesaid, the 26th day of November, in the year of our Lord one thousand eight hundred and eighty-eight, and in the one hundred and thirteenth year of the Sovereignty and Independence of the United States of America.

J. P. CAREY,
Complainant's Solicitor.
BACHMAN & YOUMANS,
Of Counsel.

Memorandum.

The defendants will take notice that they are required to enter their appearance in this suit in the clerk's office of the circuit court of the United States for the district of South Carolina on or before the first Monday of January, 1889; otherwise the bill will be taken *pro confesso* against them.

J. E. HAGOOD,
C. C. C. U. S., Dist. of S. C.

J. P. CAREY,
Compl't's Sol'r.
BACHMAN & YOUMANS,
Of Counsel.

24 On the 8th day of December, A. D. 1888, the following notice of appearance was filed:

Appearance.

UNITED STATES OF AMERICA, *District of South Carolina:*

In the Circuit Court, Fourth Circuit.

ISABELLA LEE, by Her Next Friend, GIDEON LEE,
vs.
RICHARD W. SIMPSON.

We appear for the defendant in this case as of this day. Dec'r 8th, 1888.

WELLS & ORR,
By JNO. C. HASKELL.

Endorsed: Filed 8 day of December, 1888.

25 And on the 15th of December, 1888, came into court the defendant, and, by his solicitors, Wells and Orr and Smythe & Lee, filed the following answer:

Answer.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

ISABELLA LEE, a Citizen of the State of New York, an Infant, by Her Next Friend, Gideon Lee, a Citizen of the State of New York, Complainant,
against
RICHARD W. SIMPSON, a Citizen of the State of South Carolina.

Answer of the defendant.

The answer of Richard W. Simpson to the bill of complaint of the complainant aforesaid.

This defendant, saving and reserving to himself all and all manner of exception to the error, uncertainties, and imperfections in the complainant's said bill contained, for answer thereto or to so much and such parts thereof as he is advised that it is material and necessary for him to make answer—answering, says:

I. That the facts as alleged in said bill, if they be true as so stated, do not make out such a case as calls for the interposition of a court of equity, inasmuch as they do not show that the complainant has not a plain and adequate remedy at law; that the complain-
26 ant's cause of action as stated in said bill, if any she have, is not against the defendant in any judiciary capacity, but is simply an action of ejectment or to try title to real estate and for damages for which her remedy at law is complete; that the complainant nowhere alleges that she has brought her action at law to establish her title to and recover her possession of the property in question, and that this proceeding is ancillary thereto; that there is

nothing in said bill to establish any liability on the part of this defendant to account for the acts of Thomas G. Clemson, alleged to be trustee, and this defendant therefore submits that the complainant cannot and is not entitled to maintain said bill, and he craves that he may have the same benefit of these exceptions as if he had specially demurred on these grounds to the said bill of complaint because thereof.

II. Further answering, this defendant says that Floride Calhoun and her daughter, Cornelia Calhoun, being seized and possessed as tenants in common of the plantation commonly known as Fort Hill, on the east side of Seneca river and which is now Oconee county, in the State of South Carolina, and containing eleven hundred and ten acres, more or less, on or about the 13th day of May, 1854, conveyed the same, with certain negro slaves and other personalty, to Andrew P. Calhoun for the sum of forty-nine thousand dollars, and that to secure the purchase-money thereof the said Andrew P. Calhoun did execute his bond, secured by a mortgage of the said property, conditioned for the payment to the said Floride Calhoun for the sum of forty thousand two hundred dollars and to the said Cornelia Calhoun for the sum of eight thousand two hundred dollars.

III. That thereafter, to wit, on the — day of ——, A. D. 1856, the said Cornelia Calhoun died intestate and unmarried, and that thereafter, to wit, on the — day of February, A. D. 1856, letters of administration were duly granted to one Thomas G. Clemson.

IV. That thereafter, to wit, on the 12th day of March, 1856,
27 the said Floride Calhoun and the said Thomas G. Clemson, as administrator of the estate of the said Cornelia Calhoun, deceased, instituted proceedings for foreclosure against the said Andrew P. Calhoun on the bond and mortgage aforesaid in the court of equity for the district of Pickens and State of South Carolina.

V. That thereafter, to wit, on the 25th day of July, A. D. 1866, and during the pendency of said action for foreclosure, the said Floride Calhoun departed this life leaving in full force her last will and testament and codicil thereto, a copy of which is hereto attached as Exhibit A, as a part and parcel of this answer, and reference thereto craved; that the said will and codicil were duly admitted to probate, and that Edward Noble, one of the executors therein named, duly qualified thereon and took upon himself the administration thereof.

VI. That the twentieth clause of the said will of the said Floride Calhoun is as follows:

One part, being the fourth of the above residue, I give and bequeath to my daughter Anna during her life and for her sole and separate use, and at her death I will and bequeath it to her daughter Floride, and at Floride's death, if she dies without issue, I will and bequeath it to the children of my deceased sons, John and William, then living, equally among them or to their issue, if they be dead; issue to represent the parent.

The better to effect my intentions in regard to the property in this and the second clause given to Anna, I appoint Edward Noble, of Abbeville, trustee for it, and vest in him the legal title. Should

Anna at any time wish to sell the house and lands in Pendleton, or all or any portion of the property given to her for life, the trustee, provided it meets with his approval, is authorized to dispose of it according to the wishes of my daughter, upon having her written request for so doing. The proceeds of such sale the trustee shall hold subject to the trusts and limitations declared in reference to the original property. The trustee is authorized and re-
28 quired to invest the proceeds and also the fourth part of the residue herein given to her in such property or in such way as she may in writing direct, provided it meets with his approval. The trustee is authorized and required from time to time to change such investments as often as he may be directed so to do by my said daughter in writing, provided it meets with his approval, holding always the substituted property or reinvestments subject to the trusts and limitations aforesaid. If from death or any other cause there is no trustee or if Anna at any time should desire to change her trustee she shall have the power so to do and to appoint another by instruction in writing under seal executed by her in the presence of two subscribing witnesses; and as often as she may desire to change her trustee she shall have the power so to do by observing the form and solemnity above described.

VII. That in and by the said codicil the said Floride Calhoun devised three-fourths of her interest in the said bond and mortgage amounting to about forty thousand two hundred dollars on the following trusts: "To my daughter, Anna M. Clemson, to be enjoyed by her under clause twenty of the will and according to the provisions of that clause to vest in the same trustee and to be subject to all the powers, trusts, conditions, and limitations of that clause precisely as the bequests therein made were subject to them, with this exception and alteration, that my daughter Anna is hereby authorized and empowered by her last will and testament duly executed by her to dispose of this bequest of three-fourths of said bond and mortgage debt as she pleases. If she does not thus dispose of it at her death I give and bequeath it, the said three-fourths, to her daughter Floride; and should the said daughter, Floride, die without leaving issue I give and bequeath it, at her death, to her brother, Calhoun Clemson; but, nevertheless, Floride shall likewise have power to dispose of it at her death as she pleases by a will and testament duly executed by her." For the further provisions of said codicil see will which is hereto attached.

29 VIII. That thereafter, to wit, on the 13th day of December, 1871, the said Thomas G. Clemson was substituted as trustee of Anna M. Clemson, under the trusts of the will of Floride Calhoun, in the place and stead of Edward Noble, by an instrument in writing, duly executed in accordance with the requirements of said will, and the said Thomas G. Clemson duly accepted the said trust.

IX. That thereafter the said Edward Noble, as executor of the said Floride Calhoun, was substituted on the record of the proceedings for foreclosure against the said Andrew P. Calhoun, and the

cause, after having been taken by appeal to the supreme court of the State of South Carolina, resulted in a decree of foreclosure, under which the said Fort Hill property was sold and purchased by the said Thomas G. Clemson on the 1st day of January, A. D. 1872, and subsequently, to wit, on the 10th day of June, 1875, a title was made for the same in pursuance of a decree of the court to said Thomas G. Clemson, as trustee of Anna M. Clemson, under the will of Floride Calhoun, deceased.

X. And this defendant denies the allegation of the said bill of complaint that the only consideration for the said conveyance was a nominal consideration of three dollars.

On the contrary, he alleges that the consideration thereof was the mortgage debt so due by the said Andrew P. Calhoun; and he alleges further that the said Thomas G. Clemson did, at that time, out of his own private funds and as a part of the same transaction, discharge legacies and demands due and constituting a charge upon the said property amounting to six thousand nine hundred and sixty-four $\frac{43}{100}$ dollars, which have never been repaid to him, but which constitutes to-day advances made by the said Clemson, out of his individual funds, for the purchase and redemption of the said property.

XI. That thereafter, to wit, on the 5th day of November, 1873, a partition in kind was made of the said Fort Hill plantation between the said Anna M. Clemson, Thomas G. Clemson, as her trustee, on the one part, and the complainant and Gideon Lee, as her guardian, on the other part, by which one-fourth part thereof, amounting to two hundred and eighty-eight acres, was allotted and set off to the complainant, and the remainder, amounting to about eight hundred and fourteen acres, was allotted and set off to the said Anna M. Clemson and Thomas G. Clemson; that the said complainant thereupon entered into possession of the said piece or parcel of said property so allotted to her, and has ever since remained in possession thereof.

XII. That thereafter, to wit, on the 12th day of September, 1875, the said Anna M. Clemson, otherwise known as Anna C. Clemson, departed this life, leaving in full force and unrevoked her last will and testament, bearing date the 29th day of September, A. D. 1871, wherein she devised and disposed of all her property, including her interest in the Fort Hill property, so held in trust under the provisions of the will of the said Floride Calhoun to her husband, the said Thomas G. Clemson, absolutely and in fee simple; that the said last will and testament was duly executed by the said Anna M. Clemson and was duly admitted to probate in the court of probate for the county of Oconee and State of South Carolina, and he annexes to this his answer, and as part and parcel thereof, a copy of the will of said Anna M. Clemson as Exhibit B and craves reference thereto, as part of this answer, as often as may be necessary.

XIII. And this defendant denies that the said Anna M. Clemson died without having exercised the power of disposition conferred upon her in and by the last will and testament of the said Floride Calhoun. On the contrary, this defendant alleges that by her last

will and testament, duly executed as aforesaid, the said Anna M. Clemson did dispose of the property held under the trusts of said will in favor of her husband, Thomas G. Clemson, and from and immediately after her death the said property vested in the said Thomas G. Clemson in fee simple, and that his continuous and undisturbed possession thereof from that time was in his own right and not as trustee.

31 XIV. And this defendant further *denies* that the said property so remaining in the possession of the said Thomas G. Clemson after the death of the said Anna M. Clemson was remunerative or that there was any net income, rents, or profits whatsoever *arriving* therefrom.

XV. Further answering, the defendant says that thereafter, to wit, on the 6th day of April, 1888, the said Thomas G. Clemson departed this life, leaving in full force and unrevoked his last will and testament, bearing date the 6th day of November, A. D. 1886, together with a codicil thereto, bearing date the 26th day of March, 1887.

That the said will and codicil were duly admitted to probate in the court of probate for the county of Oconee and the State of South Carolina aforesaid on the 20th day of April, 1888; that in and by the said codicil this defendant was named and constituted the sole executor of the said last will and testament, and the said Fort Hill property was devised to him as executor of Thomas G. Clemson, in certain trusts fully set out in said will and codicil.

XVI. And this defendant, further answering, says that as executor of the said Thomas G. Clemson, deceased, and not in his individual capacity, he entered into and now remains in possession of the said Fort Hill plantation, which has been in the undisturbed possession of the said Thomas G. Clemson, he claiming the same in fee-simple, from the death of said Anna M. Clemson, in September, 1875; that the complainant and her guardian, Gideon Lee, long prior to the filing of her said bill, well knew that the possession of this defendant was as the executor of Thomas G. Clemson, deceased, and not in an individual capacity, and he alleges that the said Thomas G. Clemson, at the time of his death, had a clear and indefeasible title in fee simple in and to the said property and was in possession thereunder; and this defendant continues and still is in possession of the said property as the executor of the said Thomas G. Clemson, and as such is vested with an absolute title in fee simple, subject only to the trusts in the said will contained.

32 XVII. And this defendant denies that either as executor or in his individual capacity has he come into possession of any accumulated income, rents, issues, or profits from the said property received by the said Thomas G. Clemson, or that he has any property or assets of any description representing any such income, rents, issues, or profits, and that the only income, rents, issues, or profits of the said property which he has ever received from the said property is the amount of sixty-six dollars, which he has received as executor since he has so entered into possession thereof.

XVIII. And this defendant denies that he, as Richard W. Simp-

son, as he is sued in this action, intends or is about to execute any deeds of the said eight hundred and fourteen acres of the said plantation or the accumulated income, rents, issues, and profits thereof to any use or purpose whatsoever.

XIX. And this defendant further denies that the said complainant, even if the facts alleged in the said bill of complaint are true, has any legal title to the property in question, because he says at the death of the said Floride Calhoun the property then constituting the *corpus* of the said trust estate was personal property, to wit, a bond and mortgage of A. P. Calhoun; that in and by the will and codicil of said Floride Calhoun it was provided that if the said Anna M. Clemson did not dispose of her interest therein such interest, to wit, three-fourths of the said bond and mortgage, should go to her granddaughter Floride; and should the said Floride die without issue, then at her death to her brother, John Calhoun Clemson; that the said Floride Clemson, afterwards Floride Lee, departed this life on the 27th day of August, 1871, and prior to the death of the said Anna M. Clemson, in consequence whereof the said property did not vest in the complainant, but became part of the residuary estate of the said Floride Calhoun, and that therefore the complainant, not having the legal title to the said property, cannot in any event maintain this action against this defendant.

XX. Further answering, this defendant says that since the death of the said Anna M. Clemson, to wit, since the 22d day of
33 September, A. D. 1875, the said Thomas G. Clemson has been in quiet, open, and continuous possession of the said Fort Hill property, claiming to hold the same as his individual property in fee simple; that this fact and this claim has been well known to the complainant and to her guardian, Gideon Lee, but that they have acquiesced therein, and that no objection thereto or adverse claim to the said property has been set up by the complainant or any one in her behalf until the commencement of this action on the 26th day of November, A. D. 1888, a period of over thirteen years; and this defendant submits that by this laches the complainant has deprived herself of the right now to invoke the aid of a court of equity.

XXI. And this defendant, further answering, submits to the court that the allegations of the complainant's bill go only to show that she claims the legal title to a piece of real estate described in the complaint, of which she is not in possession, and that the defendant refuses to recognize such title or the right of the complainant to the possession of such property, setting up title in another; that this constitutes a cause of action cognizable only in a court of law, in which the remedy of the complainant is complete, and over which this court has no jurisdiction.

XXII. And this defendant further submits that nowhere in the said bill is there contained any allegation in any manner setting up or constituting any fiduciary relation whatsoever between the complainant and the defendant, Richard W. Simpson, nor showing or setting up any right or equity whatsoever in the said complaint to call this defendant to any account, nor any liability on him to ac-

count to her in any way, shape, or manner. On the contrary, the allegations of the said bill tend only to set out that this defendant is a trespasser in possession of certain property, to which the complaint alleges that she has title and which belongs to her; that it is nowhere alleged that this defendant is insolvent, and that, as a matter of fact, he is abundantly solvent, and that therefore
34 the allegations of the complainant's bill go to make out simply an action at law against this defendant, for which her remedy at law is adequate and sufficient.

XXIII. And this defendant, further answering, submits that the complainant is not entitled to the relief asked in her said bill, nor to any decree against this defendant, in his individual capacity, in which alone he is sued in this proceeding; that he is in possession of said land solely as executor, and that no decree can be rendered in this action which can affect his possession as executor or in any way bind him as such.

XXIV. And this defendan, tspecifically answering the interrogatories propounded to him and annexed to the said bill of complaint, and for answer to them, saith:

To the first interrogatory: That the title of the complainant is not correctly set forth in the said bill; that the said Anna M. Clemson fully exercised the power conferred upon her by the will of the said Floride Calhoun, and disposed of the said property in favor of the said Thomas G. Clemson, thereby vesting the legal title in him; and he alleges that the title to the said property is correctly set forth in this answer.

To the second interrogatory: That the said Thomas G. Clemson went into possession of the said eight hundred and fourteen acres of land as trustee of Anna M. Clemson, under the trusts of the will of Floride Calhoun, but that at the same time, and as part and parcel of the same transaction, he paid out of his individual funds the sum of six thousand nine hundred and sixty-four $\frac{43}{100}$ dollars, necessary to clear said property from incumbrances imposed upon and resting upon it under the will of said Floride Calhoun.

To the third interrogatory: That the said Anna M. Clemson did fully execute the power of disposition conferred upon her by the will of the said Floride Calhoun in the manner fully hereinbefore set forth.

35 To the fourth interrogatory: That the appraised value of the said Fort Hill plantation of eight hundred and fourteen acres is fifteen thousand dollars.

To the fifth interrogatory: That the said Thomas G. Clemson never, so far as the defendant is informed, ever received any net income, rents, issues, and profits of the said eight hundred and fourteen acres.

To the sixth interrogatory: That the said Thomas G. Clemson has been in the quiet and undisturbed possession of the said Fort Hill plantation of eight hundred and fourteen acres, claiming the same as his individual property, ever since the said 22d day of September, 1875, and that since the death of the said Thomas G. Clemson that possession has been continued in his executor, and that

such executor has collected the sum of sixty-six dollars as the entire income, rents, issues, and profits of the said property since his coming into possession thereof.

To the seventh interrogatory: That he, the said Richard W. Simpson, does not intend to convey and will not, unless arrested by judicial process, convey the said plantation and income, rents, issues, and profits thereof to uses and purposes which will defeat the rights of the complainant therein.

To the eighth interrogatory: That he, the said Richard W. Simpson, does not contemplate, in any contingency possible to arise, conveying such property, as Thomas G. Clemson died in possession of, in any manner whatsoever.

XXV. And this defendant submits to this honorable court that all and every the matters in the said complainant's bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said complainant is not entitled to any relief from a court of equity, and this defendant hopes that he shall have the same benefit of this defence as if he had demurred to the said complainant's bill.

36 And this defendant further denies each and every allegation in said bill not hereinbefore specifically admitted or denied.

And this defendant denies all and all manner of unlawful combination wherewith he is by the said bill charged, without this, that there is any other matter, cause, or thing in the said complainant's bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is true to the knowledge or belief of this defendant.

All matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

WELLS & ORR.
SMYTHE & LEE,
Defendant's Solicitors.

UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit.

Personally appeared Richard W. Simpson, defendant above named, and, being duly sworn, deposes and says that the foregoing answer is true of his own knowledge, except as to those matters therein stated on information and belief, and as to such matters he believes them to be true.

RICHARD W. SIMPSON.

Sworn to before me this 13th day of December, 1888.

HENRY McIVER,
Ass. Justice of the Supreme Court of South Carolina.

37 (EXHIBIT A.)

Copy of the Will and Codicil of the Late Mrs. Floride Calhoun.

In the name of God, Amen.

I, Floride Calhoun, of Pendleton, S. C., relict of the late John C. Calhoun, in good health and of sound mind, do execute this my last will and testament, hereby revoking all others heretofore made.

1.

I direct my executors to pay my debts.

2.

To my daughter Anna Maria, wife of Thos. G. Clemson, of Maryland, I give, devise, and bequeath during her life, and for her sole and separate use, the following property: My house and lot in Pendleton and the land attached and belonging thereto, purchased by me from Mrs. William Adger, together with the furniture and everything in the house and upon the premises, reserving, however, the silver and such other articles as I may hereafter specifically give to others; also all my jewelry and the silver cups and prayer book presented to me by the church at Newport, R I. At Anna's death I devise and bequeath all the above-mentioned property to her daughter, Floride Clemson, and at the death of Floride, if she dies without issue, I devise and bequeath it to my sons, John's and William's, children then living equally among them, or, if they be dead, to their issue then living.

3.

To my granddaughter, Floride Elizabeth Clemson, I give and bequeath all my silver not heretofore given to others; also my tortoise-shell work-box, a gift from my late friend and cousin, Edward
38 Boisseau; also the work-box given to me by her mother, including the contents of both boxes. I also give and bequeath to her my negro boy, Andy, now about nine years old.

4.

To my grandson, John Calhoun Clemson, I give and bequeath my man Jackson and the sum of one thousand dollars; also the book containing the funeral ceremonies of his grandfather, presented to me by Mr. R. Pinckney, of Charleston.

5.

To Kate P. Calhoun, my daughter-in-law, I give and bequeath for and during her life the following articles, viz: The oak bedstead given me by my son William; one mattress, one feather bed, bolster, and two pillows; one black walnut bureau, with glass fixtures; a small mahogany rocking chair, four fancy chairs; a centre table, with marble top; a small camp chair; the photographs of

my sons John and William; the oil-painting portraits of my mother and husband; the fancy painting representing Byron's Dream and the two china flower pots given me by her mother. At Kate's death I give and bequeath the above articles to her children, my grandchildren, who survive her.

6.

To John C. Calhoun, my grandson, child of deceased son John, I give and bequeath the large Bible given to me by his father.

7.

To Benj. A. P. Calhoun, my grandson, child of my deceased son John, I give and bequeath his grandfather Calhoun's Work on Government, marked on the outside in print in my name.

39

8.

To William Lowndes Calhoun, my grandson, child of my deceased son William, I give and bequeath the book called the "Nile Boat," given to me by his father, and all my shells which were given to me by his father.

9.

To my son, Andrew P. Calhoun, I bequeath his father's portrait, painted in Europe, and now hanging at Fort Hill.

10.

To Margaret Calhoun, my son Andrew's daughter, I give and bequeath my two silver goblets with handle and inscription, both given by her father—one to me and the other to my deceased daughter, Cornelia.

11.

To Duff Green Calhoun, my grandson, I give and bequeath Wordsworth's Poems, which has my name in it.

12.

To John C. Calhoun, my son Andrew's child, I give and bequeath "Scott's Poetical Works," given to me by my deceased daughter Cornelia.

13.

To Andrew P. Calhoun, my grandson, I give and bequeath the "Carolina Tribute to Calhoun," presented to me by the author.

14.

To James Edward Calhoun, my grandson, I give and bequeath the "Women of the Bible".

40

15.

To Patrick Calhoun, my grandson, I give and bequeath the book called the "Men of the Bible."

16.

To Mary Lucretia Calhoun, my granddaughter, I give and bequeath my silver napkin rings, one dozen.

17.

To Floride Ryon, my namesake, daughter of James H. Ryon, of Winnsboro, I give and bequeath my toilet box, containing two small glass perfume bottles; also "Nature's Gems," a book presented to me by her grandmother.

18.

To Emma Floride Cunningham, my namesake, daughter of Floride C. Cunningham, of Charleston, I give and bequeath my gold watch and chain and the trinkets, key, pen, and medallion.

19.

I am possessed still of a large residue of property, consisting principally of a debt due me by my son Andrew for the purchase of Fort Hill, amounting to about $40,200, secured to me by bond and mortgage. I have also an unsecured interest in a gold mine in Dahlonega, Ga., belonging to the estate of my late husband, and also an interest in the estate of my second son, Patrick, and second daughter, Cornelia, besides other property. Whatever real or personal property I may possess at my death and not hereinbefore specifically or otherwise disposed of, I direct my executors to sell whenever they shall deem it advisable. I direct my executors to collect, as fast as possible, the above-mentioned residue of my estate, and after paying off my debts and the legacy to Calhoun Clemson the remainder I wish divided into four parts, which I dispose of as follows:

41 20.

One part, being the fourth of the above residue, I give and bequeath to my daughter Anna during her life and for her sole and separate use; and at her death I will and bequeath it to her daughter Floride, and at Floride's death, if she dies without issue, I will and bequeath it to the children of my deceased sons John and William then living equally among them or to their issue if they be dead; issue to represent the parent.

The better to effect my intentions in regard to the property in this and the second clause given to Anna I appoint Edward Noble, of Abbeville, trustee for it and vest in him the legal title. Should Anna at any time wish to sell the house and lands in Pendleton or all or any portion of the property given to her for life, the trustee, provided it meets with his approval, is authorized to dispose of it according to the wishes of my daughter upon having her written request for so doing. The proceeds of such sale the trustee shall hold subject to the trusts and limitation declared in reference to the original property. The trustee is authorized and required to invest

the proceeds, and also the fourth part of the residue herein given to her, in such property or in such way as she may in writing direct, provided it meets with his approval. The trustee is authorized and required from time to time to change such investments as often as he may be directed so to do by my said daughter in writing, provided it meets with his approval, holding always the substituted property or reinvestments subject to the trusts and limitations aforesaid. If from death or any other cause there is no trustee or if Anna at any time should desire to change her trustee, she shall have the power so to do and to appoint another by instruction in writing, under seal, executed by her in the presence of two subscribing witnesses; and as often as she may desire to change her trustee she shall have the power so to do by observing the form and solemnity above described.

42 21.

One-fourth part of said residue of my said estate I give and bequeath to my granddaughter, Floride E. Clemson, but if Floride should die without leaving issue I give and bequeath it at her death to the children of my sons John and William, or the issue of them if they be dead, the issue to take by representation.

22.

The remaining two-fourths I dispose of as follows: To Kate P. Calhoun, my daughter-in-law, I give and bequeath the one-half of the one-fourth of said residue of my estate, to be enjoyed by her during her widowhood. At her death or marriage, whichever first happens, I give and bequeath the same to such of her children—being my grandchildren—as they may be alive; but should either of my said grandchildren die under twenty-one years of age, leaving no child or children, the share of such deceasing grandchild shall go to the survivors or survivor of them or their issue, the issue representing the parent. If Kate should die before me what I have given her in this will is not to revert to my estate, but is to go to her children—my grandchildren—living at my death, subject to the conditions and limitations above expressed.

23.

The remaining fourth and half of a fourth of the aforesaid residue of my estate I give and bequeath to my grandsons, John C. Calhoun and Benjamin A. P. Calhoun, sons of my deceased sons, John and William Lowndes Calhoun, child of my second son William, equally among them. And should either of them die under twenty-one years of age, leaving no issue, the share of such deceased child shall go to the survivor or survivors.

24.

In no event do I wish to die intestate as to any portion of my es-

tate. If I have failed in the foregoing clauses to dispose of
43 the whole of my estate I will and direct the residuum, whatever it my consist of, to be converted by my executors by sale into money and equally divided between the children of my daughter Anna and the children of my deceased sons John and William, each child of the three parents taking an equal share.

25.

I nominate and appoint as executors to this my last will and testament my friends and relatives, Edward Noble, of Abbeville, and Thos. J. Pickens, Sr., of Pendleton.

In testimony whereof I hereunto affix my signature this the 27th day of June, A. D. 1863.

(Signed) FLORIDE CALHOUN.

Signed, published, and declared by the testatrix as and for her last will and testament in our presence, who, at her request and in her presence, subscribed our names as witnesses thereto.

(Signed) Rev. A. H. CORNISH.
(Signed) WM. HENRY TRESCOTT.
(Signed) EUGENIA PARKER.

Codicil to Mrs. Floride Calhoun's Will.

The termination of the late war having deranged all property matters and in a great measure destroyed the wealth of the country, and as such has been its effect upon the extent and value of my estate it is necessary that my will hereto attached be altered to conform to the altered condition of the country, therefore it is that I add this codicil reshaping and changing the disposition heretofore made of my estate.

1.

I give and devise to my daughter-in-law, Kate P. Calhoun, and to her children, John C. Calhoun, Benjamin A. P. Calhoun, and William Lowndes Calhoun, my house and lot in Pendleton, with

the land, about 75 acres, attached and belonging thereto, which,
44 by the 2nd clause of the will, was given to my daughter, Anna M. Clemson. The furniture and all other description of property embraced in said second clause is not included in this gift to Kate and her children. Kate's share in the house, lot, and lands attached shall be one-third part, the share to the children, the remaining two-thirds, to be equally divided between them; Kate's share to be enjoyed by her according to the terms, conditions, and limitations set forth and declared in clause 22 of the will and

in all respects to be subject to the provisions of that clause, not only in regard to her enjoyment of it during her widowhood, but also in regard to the remainder over to the children. The said children's share they are to have and enjoy under the provision of the 23d clause of the will and in accordance with the terms, conditions, and limitations of that clause. As it may be impracticable for Kate and the children to occupy the house and premises as a residence, should that be the case, power and authority is hereby given to my executors or executor, if but one qualifies and acts, to sell the house and premises either at public or private sale and at such time as to them or him may be deemed most beneficial to the parties in interest. The proceeds of sale will be divided among them according to their respective interests. That part coming to Kate my executors or executor are directed to invest for her benefit and to pay her the annual interest and holding the principal for the children; but should a sale not be deemed the best policy, my executors or executor are authorized to lease or rent the property in the most advantageous manner and to pay the income thus derived annually to the parties according to their respective rights. The property given Kate and her children in this clause of the codicil is in lieu and place of the shares given them in the residue of my estate mentioned in clause 19 of the will, so far as the bond and mortgage debt against the estate of my deceased son Andrew constitutes a part of that residue.

2.

By the 19th clause of the will I direct the said bond debt on my deceased son Andrew, secured by mortgage on Ft. Hill, together with all other property possessed by me and not before disposed of, to be collected by my executors and the proceeds to be divided into four parts. One part I give to Anna, one part to her daughter Floride, and the two other parts to Kate and her children, as will appear by clauses 20, 21, 22, and 23 of the will. I desire now to change this disposition of said bond and mortgage debt, and do now give and bequeath it in the following manner:

Three-fourths of my interest in said bond and mortgage debt, amounting to about $40,200, I hereby give and bequeath to my daughter, Anna M. Clemson, to be enjoyed by her under clause 20 of the will, and according to the provisions of that clause to vest in the same trustee and to be subject to all the powers, trusts, conditions, and limitations of that clause precisely as the bequests therein made were subject to them, with this exception and alteration, that my daughter Anna is hereby authorized and empowered, by a last will and testament duly executed by her, to dispose of this bequest of three-fourths of said bond and mortgage debt as she pleases. If she does not thus dispose of it at her death I give and bequeath it, the said three-fourths, to her daughter Floride, and should the said Floride die without leaving issue I give and bequeath it at her death to her brother, Calhoun Clemson; but, nevertheless, Floride shall likewise have power to dispose of it at her death as she pleases by a last will and testament duly executed by her. By clause 2d of the will I

gave the furniture and every article of property in my house in Pendleton and upon the premises, with certain reservations, and also my jewelry and some other small articles to my said daughter Anna. I now confirm to her the bequest of aforesaid furniture and all other personal property embraced in said 2d clause, which it is my will that she shall enjoy for life as her sole and separate estate, and at her death I give and bequeath all this personal property to her daughter Floride absolutely. To Anna I also give and bequeath the oil portrait of my mother, which by clause 5th of my will I gave to my daughter-in-law Kate.

3.

The remaining one-fourth part of my interest in said bond and mortgage debt against the estate of my deceased son Andrew
46 I give and bequeath to Floride E. Clemson, my granddaughter, but if she dies without leaving issue I give and bequeath it to her brother, John Calhoun Clemson. She, nevertheless, is hereby authorized and empowered to dispose of said fourth part as she pleases by her last will and testament duly executed. I also give my said granddaughter Floride the twelve silver napkin rings given by clause 15 of the will to Mary Lucretia Calhoun, who has since died.

4.

Should my granddaughter Floride's death occur before mine what I have given her in the will and codicil shall not fall into the residuum of my estate, but I give and bequeath it to her mother, my daughter, Anna, who shall take it subject to all the trusts, powers, and limitations imposed upon the direct bequest to her; and should my daughter Anna's death occur before mine what I have given her in the several clauses of the will and codicil shall not fall into the residuum of my estate, but I give and bequeath the same to her daughter Floride, who shall take and enjoy it as her mother would have done if living, subject to the same trusts, powers, and limitations and conditions; and should both Anna and Floride die before me what has been given to them in the several clauses of the will and codicil shall not fall into the said residuum, but I give and bequeath the whole to my grandson, John Calhoun Clemson. Should I at any time collect the aforesaid bond and mortgage debt, or any part of it, or should Fort Hill be purchased with it, or the money be invested in any other property, or be retained in hand, the property thus purchased, the property thus obtained by investment, and the money thus retained shall be considered and held to be in the place of and the same as the aforesaid bond and mortgage, and shall pass under this codicil as if the same were still in the form of said bond and mortgage—that is to say, shall pass to my daughter Anna and granddaughter Floride, as aforesaid bond and mortgage debt is directed to be divided between them.

47

6.

In addition to the legacy of $1,000 by clause 4th of the will given to my grandson, John Calhoun Clemson, it is my will that $1,000 more be added, and I direct that the $2,000 thus given him shall be paid out of the proceeds of the aforesaid bond and mortgage debt before the bequest to his mother and sister of this debt shall take effect, or this legacy shall be chargeable upon whatever property I shall purchase or upon whatever investment I shall make with the proceeds of said bond and mortgage debt.

7.

The residue of my estate will consist mainly of my interest in my deceased husband's estate. I have also an interest in the estates of my deceased daughter Cornelia and my son Patrick. The entire residue of my estate I direct my executors to collect in and for that purpose they are authorized to sell any personal or real estate, at private or public sale, and when collected in they will pay and distribute it as follows: First. My debts will be paid out of this residue from first collections made. Second. Two-thirds of the entire residue after payment of debts I give and bequeath to my grandsons, John C. Calhoun and Benjamin A. P. Calhoun and Wm. Lowndes Calhoun, children of my deceased sons, John and William, to be equally divided among them and to be subject to all provisions, conditions, and limitations of clause 23 of the will. Third. The remaining third of said residue I give and bequeath to my daughter Anne, in the same manner as the three-fourths of the bond and mortgage debt is given to her, to be subject to the same powers, trusts, limitations, and conditions, and to vest in the same trustee.

8.

Should it happen that my aforesaid grandsons, John C., Benjamin A. P., and Wm. Lowndes Calhoun, shall all die under twenty-one years of age, without issue living of any of them at the death of the longest liver, in that event it is my will that all the prop-
48 erty and estate herein given to them directly or in remainder shall go to my daughter Anna and her children: First, to Anna for life, under clause 20th of the will and clause 2d of the codicil, subject to all provisions of both clauses; secondly, at Anna's death, if she does not dispose of the same by will, to her daughter Floride, under clause 3d of this codicil, subject to all provisions of that clause. However, should it be thought necessary to expend more than the income or interest of the several legacies to these boys in giving them an education, it is my will and desire that the principal of these legacies may be trenched upon for that purpose, and the remainder over under this clause, in the event of the death of all, shall be only of so much of said legacies as remains after such educational expenditures.

9.

My will is to remain in full force, except so far as it has been altered by this codicil and so far as it may not be contradictory to and repugnant to the codicil.

In testimony whereof I hereunto affix my signature this 22d day of January, A. D. 1866.

FLORIDE CALHOUN.

Signed, published, and declared by the testatrix as and for her last will and testament in our presence, who, at her request and in her presence and in the presence of each other, subscribe our names as witnesses thereto.

REV. A. H. CORNISH.
JAMES HUNTER.
S. B. PICKENS.

(EXHIBIT B.)

Certified Copy of the Last Will and Testament of Anna C. Clemson, Deceased.

STATE OF SOUTH CAROLINA:

In the name of God, Amen.

Whereas I am entitled to legacies under the last will of my deceased mother, Floride Calhoun, and to a distributive share
49 in the several estates of my deceased sister, Cornelia Calhoun, and my brother, Patrick Calhoun, and notwithstanding my coverture have full testamentary power to dispose of the same:

Now I, Anna Calhoun Clemson, the wife of Thomas G. Clemson, of the town of Pendleton, in the county of Anderson and State aforesaid, being of sound and disposing mind, memory, and understanding, do make this my last will and testament in manner following:

I will, devise, and bequeath the entire property and estate to which I am now in anywise entitled and which I may hereafter acquire, of whatever the same may consist, to my beloved husband, Thomas G. Clemson, absolutely and in fee simple; but should my husband, Thomas G. Clemson, depart this life leaving me his survivor, or should he survive me and then die intestate, in either event I will, devise, and bequeath my entire property and estate, as well as that which I may hereafter acquire, of whatever the same may consist, to my granddaughter, Isabella Lee, the child of Gideon Lee, of the State of New York, absolutely and in fee simple. I hereby nominate and constitute Thomas G. Clemson executor of this my will.

In testimony whereof I have hereunto fixed my signature and put my seal this twenty-ninth day of September, in the year of our Lord one thousand eight hundred and seventy-one, and in the ninety-sixth of the Sovereignty and Independence of the United States of America.

ANNA C. CLEMSON. [L. S.]

Signed, sealed, and published as and for her last will and testament by Anna Calhoun Clemson, in presence of us, who, in her presence, subscribe our names as witnesses to the due execution thereof.

AMELIA NIECIESKA PINKIND.
E. B. CALHOUN.
T. G. PICKENS, JR.

I desire my dear husband, T. G. Clemson, to leave at his death, should he survive me, $500 to Maria Elizabeth Venning, in token of our appreciation of her devotion and fidelity; or should I survive him, I hereby desire the said sum should be paid her — my estate.

ANNA C. CLEMSON.

STATE OF SOUTH CAROLINA,
County of Oconee.

I certify the above to be a true and correct copy of the last will and testament of Anna C. Clemson, deceased, on file and record in this office.

Witness my hand and seal this 4th day of September, 1883.

RICHARD LEWIS,
Judge of Probate, Oconee County.

Fee for certified copy, $1.50.

Certificate of Counsel.

We, the undersigned, counsel for the defendants in this action, do hereby certify that the demurrer to the jurisdiction filed to the complainant's bill is, in our opinion, well founded in point of law.

WELLS & ORR,
SMYTHE & LEE,
Defendant's Solicitors.

Endorsed: Filed 15th Dec., 1888.

On the 17th day of December, A. D. 1888, came into court the complainant, by her attorneys, Messrs. J. P. Carey and Bachman & Youmans, and filed the following notice of motion for injunction:

Notice.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

In the Circuit Court. In Equity.

ISABELLA LEE, a Citizen of the State of New York, an Infant, by Her Next Friend, Gideon Lee, a Citizen of the State of New York, Complainant,

against

RICHARD W. SIMPSON, a Citizen of the State of South Carolina, Defendant.

To Messrs. Wells & Orr, defendant's solicitors:

Please take notice that on December 13, A. D. 1888, at 10 o'clock

a. m., in the United States court-house, at Columbia, S. C.,
52 the undersigned will move, before the circuit court of the United States or one or more of the judges thereof, if more than one be present, to grant to the plaintiff a writ of injunction to restrain the defendant from making and executing during the pendency of this suit any deed or deeds of the plantation known as the Fort Hill place, situate in Oconee county, in the State of South Carolina, or any part thereof, and from assigning or transferring during the pendency of this suit any of the accumulated incomes, rents, issues, or profits of said plantation to the State of South Carolina or any person or persons whom-ever, or to any uses or purposes which will cloud the title of the complainant thereto or in any manner tend to defeat her rights thereto.

In support of this motion the undersigned will rely on the sworn bill of complaint herein filed in this court November 26, 1888; on the affidavit of Le Roy F. Youmans accompanying this notice;
53 on the communication of the defendant to the senate and house of representatives of the State of South Carolina, dated December 4, 1888, wherein he styles himself executor of the last will and testament of Thomas G. Clemson, and the papers therewith transmitted; on the bills introduced into the senate and house of representatives, respectively, of the State of South Carolina to carry into effect the request in said communication contained and the action of those honorable bodies thereon, and the journals of said bodies during the current session.

Dec'r 10, 1888.

J. P. CAREY, *Com. Sol.*
BACHMAN & YOUMANS,
Of Counsel.

Endorsed: Filed 17 Dec'r, 1888. J. E. Hagood, C. C. C. U. S., dist. S. C.

54 On the 17th day of December, A. D. 1888, came into court the complainant, by her attorneys, Messrs. J. P. Carey and Bachman & Youmans, and filed the following affidavit of Le Roy F. Youmans on motion for injunction:

Affidavit.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court. In Equity.

ISABELLA LEE, a Citizen of the State of New York, an Infant, by Her Next Friend, Gideon Lee, a Citizen of the State of New York, Complainant,

against

RICHARD W. SIMPSON, a Citizen of the State of South Carolina, Defendant.

STATE OF SOUTH CAROLINA,
Richland County.

Personally appeared before me Le Roy F. Youmans, who, being

duly sworn, makes oath and says that since the filing of the bill of complaint herein in this court on November 26, 1888, and the
55 service of subpœna herein on him the defendant, Richard W. Simpson, has by acts most plainly manifested his intention, as charged in said bill of complaint, to make and execute a deed or deeds of eight hundred and fourteen acres of the Fort Hill place, situate in Oconee county, State of South Carolina, and the accumulated income, rents, issues, and profits thereof to uses and purposes which will wholly defeat the rights of complainant as asserted in said bill of complaint, and that on December 4, 1888, the said defendant, in pursuance of such intention, did send a communication to the senate and house of representatives, now met and sitting in General Assembly, wherein he styles himself executor of the last will and testament of Thomas G. Clemson, with which he transmitted to said bodies what he therein states to be a certified copy of said last will and testament, and in which communication he requests said bodies to accept what he styles the property in
56 said last will and testament donated for and on behalf of the State of South Carolina.

And this deponent further swears that the said property in said communication mentioned includes the eight hundred and fourteen acres of land aforesaid, the accumulated income, rents, issues, and profits thereof, and a very great portion, if not all, of the estate, real and personal, whereof the said Thomas G. Clemson died in possession. This deponent further swears that said communication of said defendant has been received and is being acted upon by the said bodies, and bills have been introduced in each thereof to carry into effect the request in said communication contained, to wit, that said bodies shall accept said property for and on behalf of the State of South Carolina, and that the said defendant and divers others associated with him in this regard are using the most strenuous efforts to have defendant's said request complied with, and with the utmost confidence in their prospect of success, and that there is im-
57 minent, pressing, and immediate danger of the same being now complied with, and that in the event of the same being complied with the said defendant will immediately execute a deed of said property to the said State and put the said State in immediate possession thereof, and that in the event of this being done, the judicial power of this court not extending to any suit in law or equity against the State of South Carolina by a citizen of another State, the complainant will be utterly remediless by this or any other court, mischief irreparable will thereby have been done, the subject of this litigation will have been irrevocably taken and removed from the control of this court, and the defendant, notwithstanding the pendency of this suit, will have successfully eluded the equity and successfully escaped from the jurisdiction of this court and the property aforesaid no longer be amenable to its decree.

LE ROY F. YOUMANS.

Sworn to before me 10th Dec'r, 1888.

58 [L. S.] E. R. YOUMANS,
Not. Pub. S. C.

Endorsed: Filed 17 Dec'r, 1888.

59 And on the same day, to wit, the 17th day of December, A. D. 1889, the following affidavit of Richard W. Simpson was filed:

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court. In Equity.

ISABELLA LEE, by Her Guardian, &c.,
vs.
RICHARD W. SIMPSON.

Richard W. Simpson, being duly sworn, deposeth and saith:

I. That he is the defendant in this action.

II. That he has read the affidavit of Leroy F. Youmans upon which is based a motion for injunction herein; that in this action this deponent is sued in his individual capacity and not as executor or representative of the estate of Thomas G. Clemson, although the complainant and her counsel both well knew long before the filing of the said bill that he was such executor; that the only relief asked is a decree against him as an individual, and none other can

60 be rendered; that the only acts which can be brought to the attention of this court or which this court can consider are the individual acts of this deponent; that the actions of one acting as an executor are in a representative capacity and are not for the individual but for the estate of the testator; that the complainant has not brought the executor of T. G. Clemson into the court; that such executor is not before the court, and that the actions of such executor can in nowise be brought before the court, he being a stranger to this proceeding; and he therefore submits that the said affidavit is not pertinent to the issues involved in this case.

III. And this deponent further says that it is true that in the discharge of his duties as executor of the will of T. G. Clemson, deceased, and acting solely as such executor and in accordance with the express provisions of the said will (with which both the complainant and her counsel were fully conversant long before this action was commenced), he did transmit a copy of the said will

61 to the Legislature of the State of South Carolina, with a copy of the inventory and appraisement of the estate of the said T. G. Clemson, but he denies that he has used or is using any efforts, strenuous or otherwise, to influence the action of that body; that having, as he was bound to do as executor, transmitted this will to the Legislature he has remained passive and has taken no other action whatsoever.

IV. This deponent further denies that if the State of South Carolina should accept the bequest made by the said will that he, the

defendant in this action, will make or execute any deed whatsoever; that he denies that he sued individually, — the defendant herein has, as such individual, either purpose or power to convey any of such property, and he respectfully submits that no order of injunction made against him is necessary because of such want of either purpose or power.

R. W. SIMPSON.

Sworn to before me this 14th December, 1888.

[SEAL.] J. A. SAWYER,
Not. Pub., S. C.

Endorsed: Filed 17th December, 1888. J. E. Hagood, C. C. C. U. S., dist. S. C.

62 And on the same day, to wit, the 17th day of December, 1888, the following affidavit of R. W. Simpson was filed:

Affidavit.

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court. In Equity.

ISABELLA LEE }
vs. }
R. W. SIMPSON. }

Before me personally appeared Richard W. Simpson, who, being duly sworn, says that he is the defendant in this action; that the demurrer to the jurisdiction of the court filed in this cause and contained in his answer herein is interposed in good faith and is not intended for delay.

R. W. SIMPSON

Sworn to before me this 15th day of December, 1889.

P. H. E. SLOAN,
[SEAL.] *N. P., S. C.*

Endorsed: Filed 17th December, 1888.

63 And on the same day, to wit, the 17th day of December, 1889, this cause came up for a hearing upon the notice of and motion for an injunction, solicitors for both complainant and defendant having been heard.

And thereafter, to wit, on the 18th day of December, 1889, the following decretal order was filed:

THE UNITED STATES OF AMERICA, }
District of South Carolina, Fourth Circuit. }

In Equity.

ISABELLA LEE, an Infant, by Prochein Ami, }
vs. }
RICHARD W. SIMPSON. }

"This is a motion for a preliminary injunction. It comes up on

bill, answer, affidavits with exhibits. From these it appears that Mrs. Floride Calhoun, the grandmother of the mother of the complainant, left in force a last will and testament; that in clauses of this will she gave to Edward Noble, as trustee, a fund then
64 invested in the bond of her son, Andrew P. Calhoun, secured by a mortgage of Fort Hill plantation, in Oconee county, and certain slaves. The purpose of the trust was that the fund be held for the sole and separate use of Mrs. Anna M. Clemson for her natural life, with a power of appointment thereof by a last will and testament, as she pleases, and in default of such appointment to her daughter, of whom the complainant is the only child; that proceedings were taken in the lifetime of Mrs. Calhoun to foreclose this mortgage. These proceedings were not consummated until after her death. At the sale for foreclosure the plantation, Fort Hill, was purchased by Thomas G. Clemson, who had in the meantime been substituted as trustee in lieu of Noble, and a conveyance thereof was made to him as such trustee under the last will and testament of Mrs. Floride Calhoun. Complainant alleges that the purchase-money was paid by a receipt for Mrs. Clemson's share in the bond. Defendant avers that this share was supplemented
65 by monies of Mr. Clemson to the extent of some $6,000. Mrs. Clemson died in 1875, some years after this conveyance, leaving, it is said, a last will and testament. Complainant charges that she did not execute the power of appointment, by reason whereof the property devolves on her. Thomas G. Clemson, so being in possession as trustee of his wife, remained in possession of Fort Hill after her death continuously until his own death, in 1888. In his answer the defendant avers that Clemson left a last will and testament with a codicil, wherein he was named as executor and whereby the Fort Hill property was devised to him upon certain trusts. In the exhibit is his letter to the General Assembly and copy of this document, wherein it appears that he was the devisee in fee of this Fort Hill plantation, and that the trust was to execute a conveyance thereof to the State of South Carolina upon the acceptance of the gift thereof on certain conditions by the said State. On the 4th December, 1888, the defendant sent into the General Assembly
66 of South Carolina, then in session, his said letter, accompanied by a copy of the said will, and in it asked the acceptance of this property thus given on behalf of the State. This bill was filed on November 26th, 1888, and subpœna was served on defendant on 28th November, 1888.

"The motion is for a preliminary injunction based on this letter of the defendant and the action of the General Assembly thereupon. One house has passed the bill accepting the gift, and the bill is now on the calendar of the other house awaiting early consideration. The General Assembly proposes to adjourn at a not distant day.

"As we have seen, the defendant has answered, but in his answer he makes defences, properly made by demurrer, and craves the same benefit thereof as if he had formally demurred. We must, therefore, consider them with the other grounds of defence in the

answer and not pass on the bill alone. The demurrer is to
67 the jurisdiction that the complainant has a plain, adequate, and complete remedy at law. Whilst it is true that in deciding upon motions for preliminary injunctions the courts must provide for the preservation of the property or rights *in statu quo* without expressing and indeed without having the means of forming an opinion as to such rights, (High on Injunctions, sec. 5, Great Western R. R. Co. *vs.* Birmingham and Oxford Junction Co., 22 Eng. Chan. Rep., 602), yet when the jurisdiction of the court is challenged that question must be met and decided. The position taken by the defendant is this: Complainant alleges that she is the owner in fee of this plantation, Fort Hill, under the will of Mrs. Calhoun. The defendant claims the fee under the will of Clemson. It is simply a question of title, cognizable by a court of law. In such an action a judgment can be had for the rents and profits. There is no occasion and no room for the peculiar jurisdiction of equity.

"The will of Mrs. Calhoun impressed with a trust the fund
68 afterward invested in Fort Hill. Of this trust Clemson became the trustee and so remained certainly up to the death of his wife. After her death he continued in possession. Did his relation to the property change at the death of his wife? The complainant charges that he held the property in trust for his wife for life with a power of appointment in her at her pleasure by will and in default thereof to the limitations of Mrs. Calhoun's will, and that there was default in the exercise of the power; that thus the legal estate remained in him subject to these limitations. There is nothing before the court going to show that Clemson ever disavowed this trust or that he gave any notice of his holding in his own or in any adverse right. If there was it could not avail as against complainant, then and now an infant, nor is there any place here for an executed use devolving the legal title on the complainant. The prop-
69 erty—Fort Hill—was purchased by Clemson at the master's sale. In paying the purchase-money, as defendant claims, a part of it only was paid by the money provided under Mrs. Calhoun's will. The remainder was supplemented by himself out of his own funds. The conveyance to him was as trustee for Mrs. Clemson under the last will and testament and codicil of Mrs. Calhoun. This was confirmed by the court. The legal title was thus fixed in him and could not pass out of him but by his deed or will. He made no such deed in his lifetime. By his will he devised the property to the defendant, a volunteer, and so charged with all the equities with which his testator held it. The legal title being thus in Clemson, no suit at law could have been maintained against him for possession during his life, nor can such a suit be maintained at law against the defendant, his devisee of the legal estate. Whatever may be the final conclusion of the court on this point, the above reasons are sufficient to prevent the dismissal of this
70 bill or the refusal of this motion on the ground of a want of jurisdiction.

"Do the circumstances of the case warrant a preliminary injunction?

"The defendant, as we have seen, was served with subpœna in this cause on 28th November, 1888. The bill gave him notice of the claim of complainant and her prayer for an injunction against him. On the 4th of December, 1888, he addressed his letter to the General Assembly of the State of South Carolina. This, with the document accompanying it, informed the General Assembly that he was the devisee in fee for the Fort Hill plantation, and that he had the right to convey it to the State of South Carolina upon compliance by the State with certain conditions therein stated. Thereupon he requested the General Assembly to accept the property thus 'donated for and in behalf of the State.' Upon receipt of this letter both houses, as has been stated, took action and that promptly.

Bills were introduced into both houses accepting the gift. In
71 each bill in each house is this section as section 1.

"SECTION 1. That the State of South Carolina hereby expressly declares that it accepts the devise and bequest of Thomas G. Clemson, subject to the terms and conditions set forth in his last will and testament, and that the treasurer of the State be, and is hereby, authorized and empowered to receive and securely hold the said property, both real and personal, and to execute all necessary papers and receipts therefor so soon as the said executor shall convey and transfer the said devise and bequest to the said State as aforesaid.

"This bill has passed one house. It is under consideration with every prospect of its passage in the other. It may very soon, in a day or two, become a law. If it does become a law the property will be taken from without the jurisdiction of this court. No process

can make the State of South Carolina a party to this suit.
72 It can have no jurisdiction over the State in a civil action, except with her consent. So far as plaintiff's right to recover this plantation is concerned, if she has such a right, it will be irretrievably lost if the legal title be conveyed to the State. It is idle to say that the State will recognise and accede to the decision of this court if it establish any rights in complainant. Courts of justice enforce their decrees by mandates whose sanction is the court. No decree or mandate can be entered or issued, obedience to which depends upon the will or courtesy of the party against whom it may be made.

"Without deciding so as to commit the court any question of right or property made in the papers submitted and solely with the purpose of preserving the *status quo*, this motion will be granted. There is a principle which governs nearly all judges on applications for preliminary injunctions, and governing me. When the danger

or injury threatened is of a character which cannot be easily
73 remedied if the injunction be refused and there is no doubt that the act charged is contemplated, the temporary injunction should be granted unless the case made by the bill is satisfactorily refuted by the defendant. United States *vs.* Duluth, 1 Dillon, 469 (Mr. Justice Miller).

"The complainant has brought her action against the defendant, not as executor, but in his personal character. He is devisee of the Fort Hill plantation, as well as executor. As such devisee he takes the legal estate charged with the equities, but not with the defaults of his testator. If there be any account for the rents and profits received by Clemson in his lifetime for such default R. W. Simpson, executor, *qua* executor, is liable, not R. W. Simpson, devisee. He takes the property, if he takes it with notice of the trust, responsible only for his own enjoyment of the rents and profits. For the same reason, the defendant not being a party as executor,
74 these proceedings cannot affect him so far as personalty in his hands to be administered as executor is concerned. The injunction, therefore, must be confined to Fort Hill plantation.

"This cause came to be heard on motion for a preliminary injunction upon the bill, answer, affidavits, and exhibits. After hearing the same and argument thereon and upon due consideration thereof—

"It is ordered, adjudged, and decreed that a writ of injunction do issue to the defendant, Richard W. Simpson, enjoining and restraining him from executing and delivering any deed or deeds of conveyance of or parting with the possession of the Fort Hill plantation as described in the pleadings of this case to any person or persons, or to or for any uses, intents, and purposes whatsoever, especially to the State of South Carolina, or to any person or persons whomsoever in behalf of the said State; this order and writ to remain in force until the further order of this court."

75 CHARLES H. SIMONTON,
U. S. Judge.

18th Dec'r, 1888.

Endorsed: Filed 18th Dec'r, 1888.

76 And on the same day, to wit, the 18th day of December, 1888, the following writ of injunction was issued in pursuance to the order of court:

Writ of Injunction.

THE UNITED STATES OF AMERICA:

The President of the United States of America to Richard W. Simpson:

Whereas it has been represented to us in our circuit court of the United States for the fourth circuit and district of South Carolina that Isabella Lee, a citizen of the State of New York, an infant, by her next friend, Gideon Lee, a citizen of the State of New York, claims to be entitled to an interest as *cestui que trust* in a plantation or tract of land situate, lying, and being in that part of Pickens district, which is now Oconee county, in the State of South Carolina, on the east side of Seneca river, known as the Fort Hill place, containing eight hundred and fourteen

acres, more or less, being part of a larger tract adjoining
77 lands of Andrew Lewis, James Crawford, and others, and having such form and marks as a plat made by M. S. McCay, deputy surveyor, on March 2nd, A. D. 1853, represents, and that one Thomas G. Clemson was the trustee thereof under the last will and testament of Mrs. Floride Calhoun, deceased, and codicil thereto; and since the death of the said Thomas G. Clemson the said plantation has passed into the possession of you, the said Richard W. Simpson, with notice of said trust, and that you, the said Richard W. Simpson, intend and are about to make and execute a deed or deeds of the said plantation to uses and purposes which will wholly defeat the rights of the said Isabella Lee in the premises, if any she has, before the same can be passed upon in our said court:

Now, therefore, we do strictly command and enjoin you, the said Richard W. Simpson, under the pains and penalties which may fall upon you in case of disobedience, that you forthwith and
78 until the further order of this court refrain from executing and delivering any deed or deeds of conveyance of or parting with the possession of the Fort Hill plantation, as described in the pleadings of the said cause, to any person or persons or to any uses, intents, and purposes whatsoever, especially to the State of South Carolina, or to any person or persons whomsoever in behalf of the said State.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Charleston, in the State of South Carolina, circuit and district aforesaid, this eighteenth day of December, in the year of our Lord one thousand eight hundred and eighty-eight.

[SEAL.]

J. E. HAGOOD,
C. C. C. U. S., Dist. of S. C.

Marshal's Return.

SOUTH CAROLINA, *Pickens Co.:*

Personally appeared before me J, B. King. U. S. deputy marshal, and makes oath that he did serve a copy of the within writ
79 of injunction and opinion and order on the defendant, Richard W. Simpson, at Pendleton, S. C., on the 24th day of December, 1888, at 9 o'clock a. m., and travelled twenty-two miles to serve the same.

JOHN B. KING,
Deputy U. S. Marshal.

Before me this 26th Dec., 1888.

JOHN L. THORNLEY,
U. S. Comm'r.

Endorsed: Filed 18th December, 1888.

80 And on the 5th day of January, 1889, came into court the complainant and, by her counsel, filed the following replication:

Replication.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

In the Circuit Court. In Equity.

ISABELLA LEE, a Citizen of the State of New York, an Infant, by Her Next Friend, Gideon Lee, a Citizen of the State of New York, Plaintiff,
against
RICHARD W. SIMPSON, a Citizen of the State of South Carolina, Defendant.

The replication of Isabella Lee, an infant, a citizen of the State of New York, by Gideon Lee, her next friend, a citizen of the State of New York, complainant, to the answer of Richard W. Simpson, a citizen of the State of South Carolina, defendant.

This repliant, saving and reserving unto herself all and all
81 manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that she will aver and prove her said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by her said bill she hath already prayed.

J. P. CAREY, *Compl'nt's Sol'r.*
BACHMAN & YOUMANS,
Of Counsel.

Endorsed: Filed Jan'y 5th, 1889.

82 On the 7th day of January, 1889, came into court the defendant, by his attorneys, and filed the following notice of motion:

Notice.

UNITED STATES — AMERICA,
District of South Carolina, Fourth Circuit.

ISABELLA LEE, a Citizen of the State of New York, an Infant, by Her Next Friend, Gideon Lee, a Citizen of the State of New York,
vs.
RICHARD W. SIMPSON, a Citizen of the State of South Carolina.

To Messrs. J. P. Carey, Bachman & Youmans, complainant's solicitors:

Please take notice that on rules day next, being Monday, the 7th

day of January, 1889, at ten o'clock a. m., or as soon thereafter as counsel can be heard, the undersigned will move before his honor C. H. Simonton, sitting as circuit judge, at the United States
83 court-house, in the city of Charleston, for an order referring it to a master to take the testimony in this cause and allotting the time for the taking of such testimony between the complainant and the defendant.

Jan'y 1st, 1889.

WELLS & ORR,
SMYTHE & LEE,
Defendant's Solicitors.

Endorsed: Filed 7th Jan'y, 1889.

84 On the same day, to wit, January 7th, 1889, after hearing counsel, the following order of reference was passed:

Order.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

ISABELLA LEE, a Citizen of the State of New York, an Infant, by Her Next Friend, Gideon Lee, a Citizen of the State of New York,

vs.

RICHARD W. SIMPSON, a Citizen of the State of South Carolina.

This cause being at issue, now, on motion of defendant's solicitors, after due notice to complainant's solicitors, ordered that it be referred to J. E. Hagood, Esqr., as special master, he being, in the judgment of the court, the fittest person for that purpose, to take the testimony in this case and report the same to this court.
85 The complainant shall have forty-five days from the date of this order to take testimony in support of her bill, the defendant thirty-five days thereafter to take testimony in his behalf, and the complainant ten days after receiving notice of the conclusion of the defendant's testimony to take testimony in reply.

Ordered further that all witnesses in the cause shall be examined orally before the said special master, if so demanded by either party; that either party be also allowed to take testimony orally elsewhere than in the State of South Carolina, according to the provisions of the sixty-seventh rule of this court under section eight hundred and sixty-three of the Revised Statutes of the United States, during the periods hereinbefore respectively allotted to them, upon due notice under the said section of their intention so to do, such notice to be not less than ten days, exclusive of the day of notice.

7th Jan'y, 1889.

CHARLES H. SIMONTON,
U. S. Judge.

Endorsed: Filed 7th Jan'y, 1889.

86 On the 15th day of March, 1889, came into court the defendant, by his attorneys, and filed the following notice of motion for security for costs:

Notice.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court.

ISABELLA LEE
vs.
R. W. SIMPSON.

To Messrs J. P. Carey, L. F. Youmans, John Wingate, complainant's solicitors:

Please take notice that on Thursday next, the 14th inst., at 11 o'clock a. m., or as soon thereafter as counsel can be heard, we will move before his honor Charles H. Simonton, at the United States court-house, in the city of Charleston, for an order requiring the complainant herein to enter security for costs in this action.

87 Very respectfully,

WELLS & ORR,
SMYTHE & LEE,
Defendant's Solicitors.

Endorsed: Filed 15 March, 1889.

88 On the same day, to wit, March 15th, 1889, the following order requiring security for costs was passed:

Order.

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court.

ISABELLA LEE
vs.
R. W. SIMPSON.

After due notice to complainant's solicitors and on motion of defendant's solicitors—

Ordered that the complainant herein do enter into bond for costs in the usual form, with sufficient security, to be approved by the clerk, in the sum of five hundred dollars, such security for costs to be entered on or before the first day of April next.

15th March, 1889.

CHARLES H. SIMONTON,
U. S. Judge.

Endorsed: Filed 15th March, 1889.

89 And thereafter, to wit, on the 30th day of April, A. D. 1889, the following security for costs was filed:

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

In the Circuit Court. In Equity.

ISABELLA LEE, by Her Next Friend, GIDEON LEE,
against
RICHARD W. SIMPSON.

I acknowledge myself liable for the costs of this case, and consent that if the plaintiff fail to recover the defendant may have execution against me for the sum of five hundred dollars.

Given under my hand and seal this 30th day of March, 1889.

GIDEON LEE, [L. S.]
Next Friend.
JNO. C. CARY. [L. S.]

In presence of—
J. P. CAREY.

Endorsed: Filed 30th April, 1889.

90 And thereafter, to wit, at the April term of the said United States circuit court for the district of South Carolina, on the 18th day of May, A. D. 1889, this cause came on to be heard before the Hon. Melville W. Fuller, Chief Justice; Hon. Hugh L. Bond, circuit judge, and the Hon. Charles H. Simonton, district judge, holding said term of court according to the law in such case made and provided.

The court, having heard argument, took the case under advisement.

And on the 21st day of May, 1889, the following decretal order was passed by the court:

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

ISABELLA LEE, by Her Guardian, GIDEON LEE,
against
RICHARD W. SIMPSON.

91 This cause came on to be heard upon bill and answer and the report of the special master reporting the testimony taken in the cause. After due consideration of the same and of the argument of counsel—

And it appearing to the satisfaction of the court that the last will and testament of Mrs. Anna C. Clemson was a due execution of the power of appointment vested in her by the will and codicil of her mother, Mrs. Floride Calhoun, it is—

Ordered, adjudged, and decreed that the order of injunction heretofore granted in this cause be dissolved and the bill of the complainant be dismissed, with costs, to be paid by the complainant.

Enter.

May 21, 1889.

M. W. FULLER,
Ch. Justice.

Endorsed: Filed 21st May, 1889.

92 On 10th of July, 1889, the following decree was filed:

Circuit Court of the United States for the District of South Carolina.

ISABELLA LEE, by Her Next Friend, GIDEON LEE,
vs.
RICHARD W. SIMPSON.

Heard May 18th, 1889, before Fuller, Chief Justice; Bond, circuit judge, and Simonton, district judge.

On May 13th, A. D. 1854, Mrs. Floride Calhoun was seized and possessed of the plantation or tract of land situate, lying, and being in that part of Pickens district, which is now Oconee county, in the State of South Carolina, on the east side of Seneca river, known as the Fort Hill place, containing eleven hundred and ten acres, more or less, and on that day the said Floride Calhoun and her
93 daughter, Cornelia M. Calhoun, sold and conveyed this plantation or tract of land, together with certain negro slaves and other personalty, to Andrew P. Calhoun for the sum of forty-nine thousand dollars, Cornelia M. Calhoun having no interest whatever in the real estate so sold and conveyed. Andrew P. Calhoun duly executed his certain bond under seal to Floride and Cornelia, conditioned for the payment of forty thousand two hundred dollars to Floride Calhoun and the remaining eight thousand two hundred dollars to Cornelia M. Calhoun, and, to secure the payment of the bond representing the purchase-money and as a part of the same transaction, at the same time duly executed and delivered to Floride and Cornelia his certain conveyance by way of mortgage and thereby granted, bargained, sold, and released the plantation or tract of land upon the condition that if he should well and truly pay or cause to be paid the sums of money in the said bond men-
94 tioned to be paid, according to the true intent and meaning thereof, the conveyance should be null and void; otherwise to remain in full force and virtue.

On the 27th day of June, A. D. 1863, Floride Calhoun duly made her last will and testament in writing, wherein and whereby, among other things, she devised and bequeathed as follows:

Second. To my daughter Anna Maria, wife of Thomas G. Clemson, of Maryland, I give, devise, and bequeath during her life, and for her sole and separate use, the following property: My house and lot in Pendleton and the land attached and belonging thereto, purchased by me from Mrs. William Adger, together with the furniture and

everything in the house and upon the premises, reserving, however, the silver and such other articles as I may hereinafter specifically give to others; also all my jewelry and the silver cup and prayer book presented to me by the church at Newport, Rhode Island.

95 At Anna's death I devise and bequeath all the above-mentioned property to her daughter, Floride Clemson, and at the death of Floride, if she dies without issue, I devise and bequeath it to my sons, John's and William's, children then living equally among them, or, if they be dead, to their issue then living.

19. I am possessed still of a large residue of property, consisting principally of a debt due me by my son Andrew for the purchase of Fort Hill, amounting to about forty thousand two hundred dollars, secured to me by bond and mortgage. I have also an unsecured interest in a gold mine in Dahlonega, Georgia, belonging to the estate of my late husband, and also an interest in the estate of my second son, Patrick, and second daughter, Cornelia, besides other property. Whatever real or personal property I may possess at my death and not hereinbefore specifically or otherwise disposed of, I direct my executors to sell whenever they shall deem it advisable.

I direct my executors to collect, as fast as possible, the above-

96 mentioned residue of my estate, and after paying off my debts and the legacy to Calhoun Clemson the remainder I wish divided into four parts, which I dispose of as follows:

20. One part, being the fourth of the above residue, I give and bequeath to my daughter Anna during her life and for her sole and separate use; and at her death I will and bequeath it to her daughter Floride, and at Floride's death, if she die without issue, I will and bequeath it to the children of my deceased sons John and William then living equally among them or to their issue if they be dead; issue to represent the parent. The better to effect my intentions in regard to the property in this and the second clause given to Anna I appoint Edward Noble, of Abbeville, trustee for it and vest in him the legal title. Should Anna at any time wish to sell the house

97 and lands in Pendleton or all or any portion of the property given to her for life, the trustee, provided it meets with his approval, is authorized to dispose of it according to the wishes of my daughter upon having her written request for so doing. The proceeds of such sale the trustee shall hold subject to the trusts and limitations declared in reference to the original property. The trustee is authorized and required to invest the proceeds, and also the fourth part of the residue herein given to her, in such property or in such way as she may in writing direct, provided it meets with his approval. The trustee is authorized and required from time to time to change such investments as often as he may be directed so to do by my said daughter in writing, provided it meets with his approval, holding always the substituted property or reinvestments subject to the trusts and limitations aforesaid. If from death or any cause there is no trustee, or if Anna at any time shall desire to change her trustee, she shall have the power so to do and to appoint

98 another by any instrument in writing, under seal, executed by her in the presence of two subscribing witnesses, and as

often as she may desire to change her trustee she shall have the power so to do by observing the form and solemnity above described.

21. One-fourth part of said residue of my said estate I give and bequeath to my granddaughter, Floride Clemson, but if Floride should die without leaving issue I give and bequeath it at her death to the children of my sons John and William, or the issue of them if they be dead, the issue to take by representation.

22. The remaining two-fourths I dispose of as follows: To Kate P. Calhoun, my daughter-in-law, I give and bequeath the one-half of the one-fourth of said residue of my estate, to be enjoyed by her during widowhood. At her death or marriage, whichever first happens, I give and bequeath the same to such of her children—being my grandchildren—as may then be alive; but should either of my said grandchildren die under twenty-one years of age, leav-
99 ing no child or children, the share of such deceasing grandchild shall go — the survivors or survivor of them or their issue, the issue representing the parent. If Kate should die before me what I have given her in the will is not to revert to my estate, but is to go to her children—my grandchildren—living at my death, subject to the conditions and limitations above expressed.

23. The remaining fourth and half of a fourth of the above said residue of my estate I give and bequeath to my grandsons, John C. Calhoun and Benjamin A. P. Calhoun, sons of my deceased sons, John and William Lowndes Calhoun, child of my second son William, equally among them; and should either of them die under twenty-one years of age, leaving no issue, the share of such deceased child shall go to the survivor or survivors.

On the 22nd day of January, A. D. 1866, Floride Calhoun duly made, published, and declared a codicil to her last will and testament, wherein, among other things, she revoked the devise of
100 the real property in Pendleton made to Anna Clemson in the second paragraph of her last will and testament, and devised the same to other persons, and provided as follows:

2. By the nineteenth clause of the will I direct the said bond debt on my deceased son Andrew, secured by mortgage on Fort Hill, together with all other property possessed by me and not before disposed of, to be collected by my executors and the proceeds to be divided into four parts. One part I gave to Anna, one part to her daughter Floride, and the two other parts to Kate and her children, as will appear by clauses 20, 21, 22, and 23 of the will. I desire now to change the disposition of the said bond and mortgage debt, and do now give and bequeath it in the following manner: Three-fourths of my interest in said bond and mortgage debt, amounting to about forty thousand two hundred dollars, I hereby give and bequeath to my daughter, Anna M. Clemson, to be enjoyed by her under clause twenty of the will, and according to the provis-
101 ions of that clause to vest in the same trustee and to be subject to all the powers, trusts, conditions, and limitations of that clause precisely as the bequests therein made were subject to them, with this exception and alteration, that my daughter Anna is hereby

authorized and empowered, by her last will and testament duly executed by her, to dispose of this bequest of three-fourths of said bond and mortgage debt as she pleases. If she does not thus dispose of it at her death I give and bequeath it, the said three-fourths, to her daughter Floride, and should the said Floride die without leaving issue I give and bequeath it at her death to her brother, Calhoun Clemson; but, nevertheless, Floride shall likewise have power to dispose of it at her death as she pleases by a last will and testament duly executed by her.

By clause 2nd of the will I gave the furniture and every article of the property in my house in Pendleton and upon the premises, with certain reservations, and also my jewelry and some other
102 small articles to my said daughter Anna. I now confirm to her the bequest of aforesaid furniture and all other personal property embraced in said 2nd clause, which it is my will that she shall enjoy for life as her sole and separate estate, and at her death I give and bequeath all this personal property to her daughter Floride absolutely. To Anna I also give and bequeath the oil portrait of my mother, which by clause 5th of my will I gave to my daughter-in-law Kate.

3. The remaining one-fourth part of my interest in said bond and mortgage debt against the estate of my deceased son Andrew I give and bequeath to Floride E. Clemson, my granddaughter, but if she dies without leaving issue I give and bequeath it to her brother, John Calhoun Clemson. She, nevertheless, is hereby authorized and empowered to dispose of said fourth part as she pleases by her last will and testament duly executed.

4. Should my granddaughter Floride's death occur before
103 mine what I have given her in the will and codicil shall not fall into the residue of my estate, but I give and bequeath it to her mother, my daughter, Anna, who shall take it subject to all the trusts, powers, and limitations imposed upon the direct bequest to her; and should my daughter Anna's death occur before mine what I have given her in the several clauses of the will and codicil shall not fall into the residue of my estate, but I give and bequeath the same to her daughter Floride, who shall take and enjoy it as her mother would have done if living, subject to the same trusts, powers, limitations, and conditions; and should both Anna and Floride die before me what has been given them in the several clauses of the will and codicil shall not fall into the said residue, but I give and bequeath the whole to my grandson, John Calhoun Clemson.

5. Should I at any time collect the aforesaid bond and mortgage debt, or any part of it, or should Fort Hill be purchased with it, or the money be invested in any other property, or be retained in
104 hand, the property thus purchased, the property thus obtained by investment, and the money thus retained shall be considered and held to be in the place of and the same as the aforesaid bond and mortgage, and shall pass under this codicil as if the same were still in the form of said bond and mortgage—that is to say, shall pass to my daughter Anna and granddaughter Floride, as

aforesaid bond and mortgage debt is directed to be divided between them.

On the 12th day of March, A. D. 1866, Floride Calhoun and Thomas G. Clemson, to whom letters of administration had been granted in February, A. D. 1866, on the personal estate of Cornelia M. Calhoun, who had departed this life intestate and unmarried in that year, as administrator of the personal estate of said Cornelia, exhibited their bill in the court of equity for the district of Pickens, State of South Carolina, against Andrew P. Calhoun and others, for the foreclosure of the mortgage of the plantation or tract of land known as the Fort Hill place, executed to secure pay-
105 ment of the bond aforesaid and for the sale of the plantation for that purpose, and at the July term, A. D. 1866, of the court a decree was made whereby it was adjudged that the mortgage be foreclosed and the mortgage realty sold; which decree on appeal was affirmed by the supreme court of the State of South Carolina, and the cause remanded to the circuit court for further proceedings in accordance therewith.

During the pendency of that suit, to wit, on the 25th day of July, A. D. 1866, Floride Calhoun departed this life, leaving in full force her last will and testament as modified by the codicil aforesaid; and thereafter, on the 7th day of August, A. D. 1866, the said last will and testament and codicil thereto were duly admitted to probate, and Edward Noble, one of the persons mentioned as executors therein, duly qualified as such on the same day.

In August, 1869, Floride E. Clemson intermarried with Gideon Lee, of the State of New York, and complainant, Isabella Lee,
106 is the only child of the marriage, and on the 27th day of August, A. D. 1871, the said Floride E. Lee, formerly Clemson, died intestate, leaving surviving her, as her sole heirs-at-law and distributees, her husband, Gideon Lee, and her daughter, Isabella Lee.

On the 29th day of September, A. D. 1871, Anna C. Clemson made her last will and testament as follows:

"In the name of God, Amen.

"Whereas I am entitled to legacies under the last will of my deceased mother, Floride Calhoun, and to a distributive share in the several estates of my deceased sister, Cornelia Calhoun, and my brother, Patrick Calhoun, and notwithstanding my coverture have full testamentary power to dispose of the same:

"Now I, Anna Calhoun Clemson, the wife of Thomas G. Clemson, of the town of Pendleton, in the county of Anderson and State aforesaid, being of sound and disposing mind, memory, and understanding, do make this my last will and testament in manner following:

"I will, devise, and bequeath the entire property and estate to
107 which I am now in anywise entitled and which I may hereafter acquire, of whatever the same may consist, to my beloved husband, Thomas G. Clemson, absolutely and in fee simple; but should my husband, Thomas G. Clemson, depart this life leaving me his survivor, or should he survive me and then die intestate, in either event I will,

devise, and bequeath my entire property and estate, as well as that which I may hereafter acquire, of whatever the same may consist, to my granddaughter, Isabella Lee, the child of Gideon Lee, of the State of New York, absolutely and in fee simple. I hereby nominate and constitute Thomas G. Clemson executor of this my will.

On the 13th day of December, A. D. 1871, the said Thomas G. Clemson was substituted as trustee of Anna M. Clemson under the will of Floride Calhoun in the place and stead of Edward Noble by the following instrument in writing:

"Whereas by the will of the late Mrs. Floride Calhoun, of Pendleton, dated June 27th, 1863, and by the codicil thereto at-
108 tached, dated 22nd January, 1866, the undesigned, Anna M. Clemson, her daughter, is entitled to considerable legacies, the legal title of which is by the will vested in Edward Noble, Esqr., of Abbeville county, in said State, as trustee.

"By the 20th clause of the will, confirmed by the 2nd clause of the codicil, the testratrix provides for a change of trustee in the following manner, viz: "If, from death or any cause, there is no trustee, or if Anna at any time shall desire to change her trustee, she shall have the power so to do and to appoint another by any instrument in writing, under seal, executed by her in the presence of two subscribing witnesses, and as often as she may desire to change her trustee she shall have the power so to do by observing the form and solemnity above described.

"And whereas the said will and codicil are in the office of the probate judge of the said county of Anderson, having been duly probated on the 7th of August, 1866, and letters testamentary
109 granted to said Edward Noble, as executor, on same date:

"Now, be it known that, in accordance with the power in me vested by the above-recited passage of my mother's will, I, Anna M. Clemson, of the said county of Anderson, do hereby nominate and appoint my husband, Thomas G. Clemson, of Pendleton, Anderson county, as trustee, under the will, for the property therein bequeathed to me and also for the property bequeathed me in the codicil, in the place and stead of the said Edward Noble, who desires to be relieved from the trust."

Executed in the presence of two subscribing witnesses and the acceptance of the trusteeship by Mr. Clemson appended.

The proceedings for foreclosure against said Andrew P. Calhoun duly went to decree, Noble, executor, having been substituted as one of the complainants, under which the Fort Hill property was sold and purchased by Thomas G. Clemson, January 1st, 1872, and on June 10th, 1875, title was made for the same in pursuance of
110 order of court to said Thomas G. Clemson, as trustee of Anna M. Clemson, under the will of Floride Calhoun. The consideration for said purchase and conveyance appears to have been the mortgage debt of Andrew P. Calhoun, and Mr. Clemson, it is alleged, also discharged legacies and demands to the amount of $6,964.93 in the purchase and redemption of said property.

On the 5th day of November, 1873, a partition in kind was made of the said Fort Hill plantation between the said Anna M. Clemson

and Thomas G. Clemson, as her trustee, on the one part, and the complainant and Gideon Lee, as her guardian, on the other part, by which one-fourth part thereof, amounting to two hundred and eighty-eight acres, was allotted and set off to complainant, and the remainder, amounting to about eight hundred and fourteen acres, was allotted and set off to said Anna M. and Thomas G. Clemson, and complainant thereupon entered into possession of said
111 parcel so allotted to her, and has ever since remained in possession thereof.

On the 12th day of September, 1875, Anna M., otherwise known as Anna C. Clemson, died, leaving in full force and unrevoked her said last will and testament, bearing date September 29th, 1871, which was duly admitted to probate, and from September, 1875, to the time of his death said Thomas G. Clemson remained in quiet, open, and continuous possession of said property, claiming to hold the same as his individual property in fee simple.

On April 6th, 1888, Thomas G. Clemson departed this life, leaving in full force and unrevoked his last will and testament, bearing date the 6th day of November, A. D. 1886, together with a codicil thereto, bearing date the 26th day of March, 1887, which will and codicil were duly admitted to probate on the 20th day of April, 1888. In and by the said codicil the defendant Simpson was named and constituted the sole executor of the said last will and testament, and the Fort Hill property was devised to him on certain trusts,
112 fully set out therein, in virtue whereof said defendant entered into and now remains in possession of the said Fort Hill plantation.

The bill was filed 26th November, 1888, asserting title in complainant to the property in question and asking a decree to that effect and that defendant held the legal title in trust for her for injunction and accounting.

For complainant: Messrs. J. P. Carey and Bachman & Youmans.
For defendant: Messrs. Wells & Orr and Smythe & Lee.

FULLER, *C. J.:* In respect to jurisdiction we are satisfied with the conclusions reached by the district judge when this cause came up on demurrer, and do not consider it necessary to add anything to the views then expressed. Lee *vs.* Simpson, 37 Fed. Rep., 12.

The main question for determination is, then, whether the property passed by the will of Mrs. Clemson as in due execution of the power under the will and codicil of Mrs. Floride Calhoun.
113 By that will and codicil three-fourths of the testatrix' interest in the bond and mortgage of A. P. Calhoun was bequeathed to Mrs. Clemson for her sole and separate use during her life, the legal title being vested in a trustee, to be disposed of and the proceeds invested as she might direct, but to be held upon like trust, with power in her to change her trustee as she might desire, and she was also authorized and empowered to dispose of said bequest by will as she pleased, whatever form it had assumed, as by purchase of the Fort Hill property or otherwise.

The rule established by the weight of English authority prior to

the statutes of 7 Will., IV, and 1 Vict., ch. 26, § 27, was that a will could not be held to be the execution of a power unless it referred to the power or described the property subject to it, or would be inoperative if not acting upon such property, but the general rule in this country is more liberal, and the intention of the testator, as the donee of the power to execute it, however manifested—
114 whether directly or indirectly, positively or by just implication—is held to prevail even though the will does not refer to the power nor designate the property, and the donee has other property upon which the will may operate, so that "the question is in every case a question of the intention of the donee of the power, taking into consideration not only the terms of the will, but the circumstances surrounding him at the time of its execution—such as the source of the power, the terms of the instrument creating it, and the extent of his present or past interest in the property subject to it." Gray, C. J. Sewall *vs.* Wilmer, 132 Mass., 134; Walker *vs.* Conn. M. L. Ins. Co., 109 U. S., 357. And a general devise or bequest may be construed as including real or personal estate of which the testator has a general power of appointment, unless a contrary intention appears by or can be deduced from the will. Funk *vs.* Eggleston, 92 Ill., 515; White *vs.* Hicks, 33 N. Y., 383; Blagge *vs.* Miles, 1 Story, 427; Andrews *vs.* Bloomfield, 32 Miss., 108.

115 In Blake *vs.* Hawkins, 98 U. S., 315, 326, Mr. Justice Strong, speaking for the Court, said: "On the other hand, if the will contained no expressed intent to exert the power, yet, if it may be reasonably gathered from the gifts and directions made that their purpose and object were to execute it, the will must be regarded as an execution. After all, an appointment under a power is an intent to appoint carried out, and, if made by will, the intent and its execution are to be sought for through the whole instrument."

In Bilderback *vs.* Boyce, 14 S. C., 528, the supreme court of South Carolina expresses its concurrence with the rule followed in the English chancery, with the modification, indicated by Mr. Justice Story in Blagge *vs.* Miles, *supra*, that if the intention to execute is, under all the circumstances, apparent and clear, so that the transaction is not fairly susceptible of any other interpretation, the execution should be sustained.

By her will Mrs. Clemson declares herself "entitled to legacies under the last will of my deceased mother, Floride Calhoun,"
116 and to a distributive share in the estates of her sister and brother, and to have, "notwithstanding my coverture, full testamentary power to dispose of the same," and she then proceeds to "will, devise, and bequeath the entire property and estate to which I am now in anywise entitled and which I may hereafter acquire, of whatever the same may consist, to my beloved husband, Thomas G. Clemson, absolutely and in fee simple." If, however, she survives him, or he surviving dies intestate, then the entire property and estate is devised and bequeathed to her granddaughter, the complainant. The will is dated September 29th, 1871, and upon the 13th of December following Mrs. Clemson exercised the power of appoint-

ing a new trustee, the instrument reciting that by the will and codicil of her mother, Mrs. Floride Calhoun, she "is entitled to considerable legacies, the legal title of which is, by the will, vested in Edward Noble, Esqr., of Abbeville county, in said State, as trustee," and proceeding to appoint Thomas G. Clemson "as trustee under the
117 will for the property therein bequeathed to me, and also for the property bequeathed me in the codicil," in the place of said Noble.

Clearly, the "legacies" to which Mrs. Clemson by the instrument of appointment stated she was "entitled" and of which she appointed her husband trustee were the same legacies to which by the will she declared herself entitled, and which she thereby devised and bequeathed to him.

Having the right to the enjoyment during life of the property so held in trust and the absolute power of disposing of it at her death, she treated it as being as much hers as the alleged distributive share, and even if she possessed only a power over and not an interest in the property it would be altogether too narrow and technical a construction under the circumstances to so limit the language "I will devise and bequeath the entire property and estate to which I am now in anywise entitled and which I may hereafter acquire, of whatever the same may consist," as to exclude
118 the exercise of the power. It is true that the mention of the distributive share allows it to be said that the instrument might have some effect by means of that interest, but this would not be all the effect the words import, and if the intention to pass all can be discovered it would seem that such intention ought to prevail. 2 Chance on Powers, 72, § 1597.

The intent to dispose of all the estate here is apparent upon the face of the will, and as the will plainly refers to the property covered by the power its words cannot be satisfied unless the instrument operates as an execution of the power.

Mrs. Clemson also asserted "full testamentary power to dispose of the same," "notwithstanding my (her) coverture," and it is ably argued by counsel that this assertion was made by way of emphasizing the fact that shortly before married women in South Carolina had been enabled to dispose of their property by will, and that, therefore, the assertion tends to sustain the contention that she regarded herself as dealing solely with property absolutely
119 owned by her in her own right, but as such statement would in that view have been wholly uncalled for and this particular property could only be disposed of by Mrs. Clemson by will, while she could alienate her own property in any way she chose, the more reasonable inference seems to us to be that she referred to the power of disposition given by her mother's testament rather than to her legal capacity.

In short, we think that, in addition to the reference to the property which was the subject of the power, there is reference to the power itself, and upon the whole case we can entertain no doubt that it was the intention of Mrs. Clemson to dispose of the property

in question by her last will and testament, and that this intention was carried out in due execution of the power.

The result, therefore, is that the bill must be dismissed, and it is so ordered.

Bond and Simonton, JJ., concur.

Endorsed: Filed 10th July, 1889. J. E. Hagood, C. C. C. U. S., dist. S. C.

120 On the 11th day of September, A. D. 1889, the following allowance and petition for appeal to Supreme Court was filed:

Allowance of Appeal.

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit. In Equity.

ISABELLA LEE, by Her Next Friend, GIDEON LEE, Complainant, }
vs. }
RICHARD W. SIMPSON, Defendant. }

To the honorable the chief justice and the associate justices of the Supreme Court of the United States:

Your petitioner, the complainant in the above-entitled cause, Isabella Lee, by her next friend, Gideon Lee, would respectfully represent and show that in the above-entitled cause pending in the United States circuit court in and for the district of South Carolina
121 there were entered, on the twenty-first day of May, A. D. 1889, a decree, and on the tenth day of July, A. D. 1889, a final decree, greatly to the prejudice and injury of your petitioner, which said decrees are erroneous and inequitable in many particulars. Wherefore, in order that your petitioner may obtain relief in the premises and have opportunity to show the errors complained of, your petitioner prays that she may be allowed an appeal in said cause to this honorable court, and that the proper order touching the security required of her may be made, and that the injunction heretofore granted and dissolved herein be continued during the pendency of said appeal.

J. P. CAREY, *Compl'nt's Sol'r.*
BACHMAN & YOUMANS,
Of Counsel.

And thereupon the appeal is allowed, bond to be given in the sum of two hundred dollars, with security, to be approved by
122 the judge of United States court for the district of South Carolina, and the injunction as prayed is continued during the pendency of the appeal, provided the appellant submits the cause under the 20th rule of the supreme court.

HUGH L. BOND, *Ct Judge.*

Endorsed: Filed 11th September, 1889.

123 And on the 30th day of September, A. D. 1889, the following appeal bond was filed:

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

In the Circuit Court. In Equity.

ISABELLA LEE, by Her Next Friend, GIDEON LEE, Complainant,
vs.
RICHARD W. SIMPSON, Defendant.

Know all men by these presents that we, John C. Cary and Louis W. Cary, are held and firmly bound unto Richard W. Simpson in the sum of two hundred dollars, to be paid to the said Richard W. Simpson, his executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of September, A. D. 1889.

124 Whereas the above-named complainant has prosecuted an appeal to the Supreme Court of the United States to reverse the decrees in the above-entitled action rendered by the circuit court of the United States for the district of South Carolina in favor of the defendant:

Now, therefore, the condition of this obligation is such that if the above-named complainant shall prosecute her said appeal to effect and answer all costs if she fails to make her plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

JNO. C. CARY. [SEAL.]
LOUIS W. CARY. [SEAL.]

Sealed and delivered in presence of—
F. A. HOKE.

THE STATE OF SOUTH CAROLINA,
Oconee County.

Personally appeared before me John C. Cary and Louis W. Cary, who on oath say that they are worth, over and above their
125 debts, liabilities, and homestead exemptions, each more than two hundred dollars.

JNO. C. CARY.
LOUIS W. CARY.

Sworn to before me 20th Sept., 1889.

F. A. HOKE, *Not. Pub.*

Approved:

CHARLES H. SIMONTON, *U. S. Judge.*

27 Sept., 1889.

Endorsed: Filed 30th Sept., 1889.

126 THE UNITED STATES OF AMERICA:

In the Circuit Court, Fourth Circuit, District of South Carolina. In Equity.

ISABELLA LEE, by Her Next Friend, GIDEON LEE, Complainant,
vs.
RICHARD W. SIMPSON, Defendant.

United States of America to Richard W. Simpson:

You are hereby notified that in a certain cause in equity in the United States circuit court for the district of South Carolina, wherein Isabella Lee, by her next friend, Gideon Lee, is complainant and you, Richard W. Simpson, are defendant, the said complainant therein has prayed an appeal to the Supreme Court of the United States from the decrees in said cause entered, and that such
127 appeal has been allowed, wherefore you are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, commencing on the second Monday of October next, to show cause, if any there be, why the decrees appealed from should not be reversed and set aside and relief be granted to said appellant, as by her prayed and as to justice and equity may appertain.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2nd day of Sept., 1889.

[Seal U. S. Circuit Court, District of So. Carolina.]

HUGH L. BOND, *C't Judge.*

127½ [Endorsed:] Citation. United States of America, district of South Carolina, fourth circuit, circuit court. Isabella Lee, by her next friend, Gideon Lee, *vs.* Richard W. Simpson. Citation. Filed 30 Sept., 1889. J. E. Hagood, C. C. C. U. S., dist. S. C.

128 On the 10th day of October, 1889, the following acceptance of service was filed:

Acceptance.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. In Equity.

ISABELLA LEE, by Her Next Friend, GIDEON LEE, Complainant,
vs.
RICHARD W. SIMPSON, Defendant.

We hereby acknowledge service of copies of the petition and allowance of appeal, continuance of injunction, and citation to defendant in the above-entitled case.

October 5th, 1889.

WELLS & ORR,
Def'd't's Att'ys.

Endorsed: Filed 10th October, 1889.

129 UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. In Equity.

ISABELLA LEE, by Her Next Friend, GIDEON LEE, Complainant,
against
RICHARD W. SIMPSON, Defendant.

I, James E. Hagood, clerk of said court, do hereby certify that the foregoing record contains true copies of the originals, to wit, petition and order for appointment of guardian as next friend, bill in equity, affidavit thereon, *subpœna ad respondendum*, appearance and answer of defendant, motion for injunction and affidavits thereon, opinion and order for injunction, writ of injunction, replication, notice and order of reference, motion for costs, security for costs, order dismissing bill, decree of court, allowance of appeal, appeal bond,
130 and acceptance of service (together with the original citation), now on file and of record in this office.

Seal U. S. Circuit Court, District of So. Carolina.

Given under my hand and seal of said court, at clerk's office, in the city of Charleston, this the 15th day of October, A. D. 1889.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Endorsed on cover: South Carolina C. C. U. S. No. 1418. Isabella Lee, by her next friend, Gideon Lee, appellant, *vs.* Richard W. Simpson. Filed October 18, 1889.

ADDITION TO TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1418.

ISABELLA LEE, BY HER NEXT FRIEND, GIDEON LEE, APPELLANT,

vs.

RICHARD W. SIMPSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED JANUARY 14, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1418.

ISABELLA LEE, BY HER NEXT FRIEND, GIDEON LEE, APPELLANT,

vs.

RICHARD W. SIMPSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JANUARY 17, 1890.

3. That Patrick Calhoun died intestate and unmarried prior to the year 1871; that Anna M. Clemson was his sister and one of his heirs-at-law and distributees.

4. That Thomas G. Clemson married Anna M. Calhoun, the daughter of Floride Calhoun; that the sole issue of such marriage was—

a. John Calhoun Clemson, who died intestate and unmarried 10th August, 1871, and upon whose estate Thos. G. Clemson administered.

b. Floride Elizabeth Clemson, who intermarried with Gideon Lee on the — day of August, A. D. 1869, and died intestate on the 27th August, 1871, leaving surviving her as her sole heirs-at-law and distributees her husband, Gideon Lee, and her only child, the complainant, Isabella Lee, who was the sole issue of the marriage.

5. That Mrs. Floride Calhoun died 25th July, A. D. 1866, leaving her last will and testament hereinafter set forth, upon which Edward Noble qualified as executor 7th August, 1866.

6. That Thomas G. Clemson purchased the Fort Hill property under the foreclosure proceedings hereinafter referred to on sale day in January, A. D. 1872, taking the conveyance therefor here-
3 inafter set forth to himself, as trustee; that such conveyance was recorded in Oconee county in the office of the register of mesne conveyances on May 11th, A. D. 1876.

7. That on the 5th of November, 1873, an informal partition of the original Fort Hill plantation was made, as set out in the pleadings, by which complainant received and entered into possession of her one-fourth of said place, consisting of about two hundred and eighty-eight acres, and that she has held continuous possession thereof ever since.

8. That Anna M. Clemson was otherwise known as Anna C. Clemson; that she died 27th September, 1875, leaving surviving her her husband and one granddaughter, the complainant, her then only living issue, and leaving her last will and testament hereinafter set forth.

9. That Thomas G. Clemson held continuous possession of the original Fort Hill plantation from 1872 to the time of such partition, and of the three-quarters thereof, consisting of about eight hundred and fourteen acres, from the time of that partition to the date of his death; that the defendant, R. W. Simpson, has held continuous possession of said three-quarters from the time of the death of Thomas G. Clemson, claiming under Clemson as his executor.

10. That Thos. G. Clemson departed this life April 6th, 1888, leaving the complainant his sole heir-at-law, and leaving his last will and testament, hereinafter set forth, upon which the defendant, R. W. Simpson, qualified as executor April 20th, A. D. 1888.

Complainant's Testimony.

1. Agreement dated 13th May, 1854, between Floride Calhoun and Cornelia M. Calhoun, of the one part, and Andrew P. Calhoun, of the second part, whereby Andrew P. Calhoun agrees to buy the Fort

Hill plantation and certain slaves and other personal property from Floride and Cornelia Calhoun for the sum of $49,000, payable in fifteen years from 1st April, 1854, commencing in ten years and completed in five equal annual instalments, with interest at
4 5½ per cent. per annum for the period of ten years, amounting to $2,695 per annum, and 3 per cent. on the instalments. Of this $8,800 was to go to Cornelia M. Calhoun and $40,200 was to go to Floride Calhoun, and interest to be divided between them proportionately.

2. On the 13th day of May, A. D. 1854, Florida Calhoun and Cornelia M. Calhoun executed their conveyance in fee simple to Andrew P. Calhoun of the Fort Hill plantation, embracing 1,102 acres and fifty slaves, the personal property on the said plantation, and other personal property, in accordance with the foregoing agreement; and on the same day Andrew P. Calhoun executed his bond to them for the sum of $49,000, in proportions and in accordance with the terms of said agreement, and secured such bond by separate mortgages of said real and personal property.

3. On the 12th day of March, A. D. 1866, Floride Calhoun and Thomas G. Clemson, as administrator of the estate of Cornelia M. Calhoun, deceased, filed their bill to foreclose said mortgage and for payment of the whole amount due on the bond against Margaret Calhoun, widow of A. P. Calhoun, deceased, and against Duff G. Calhoun, Jno. C. Calhoun, administrator of the estate of A. P. Calhoun, deceased, Margaret Calhoun, Andrew P. Calhoun, James E. Calhoun, and Patrick Calhoun, the latter being the six children of A. P. Calhoun, deceased.

The defendant, Margaret M. Calhoun, interposed the defence that the personal estate of Andrew P. Calhoun must first be applied to the payment of the mortgage debt, and that the land was only liable for the balance due; and further that the consideration of so much of the debt as was for the purchase of negro slaves had failed, such slaves having been emancipated.

The defendant, John C. Calhoun, as administrator, joined in the above defences and alleged that in the sale from Floride Calhoun and Cornelia M. Calhoun to Andrew P. Calhoun the Fort Hill plantation was valued at ---------- $15,000 00
The slaves at ---------- 29,000 00
And the other personalty at ---------- 5,000 00

$49,000 00

5 He submitted a statement of his actings and doings as administrator of the estate, among others, a sale of personalty amounting to $5,252.32.

The court overruled the defences and decreed in favor of the complainants for the entire amount of the bond.

An order was made 14th July, 1871, for a sale of the mortgaged property to satisfy the debt; and it was further ordered that all matters of account be referred to the referee, who was ordered to state the accounts and report, such accounting to embrace all the

actings and doings of the administrator of the estate of Andrew P. Calhoun, deceased, and of the former commissioner of the court of equity for that court. The rights of all parties, except as affected by such order, were reserved. Under this order the Fort Hill plantation was sold to Thomas G. Clemson, as trustee for his wife, Mrs. Anna M. Clemson, under the will of Mrs. Floride Calhoun, deceased, for the sum of $15,000, on the first day of January, A. D. 1872. The sale was confirmed by the court, and, after deducting the costs of sale, one-half the balance of the purchase-money was to be credited on the mortgage debt and the other half was to await the further order of the court.

Under these orders John C. Calhoun, as administrator, accounted fully before the referee for all sales made by him and all property in his hands, and turned over to the referee all assets of the estate, and all creditors of Andrew P. Calhoun were called in to appear before the referee and establish their claims.

Statement showing the separate interests of the estates of Mrs. Floride Calhoun and Miss Cornelia Calhoun in the emblements for 1865.

Total value of emblements, with interest		$809 31
Mrs. F. Calhoun's interest therein	$664 97	
Miss Cornelia " " "	144 34	
		809 31

Statement of the separate interests of the same estates in the rents for the years 1866, '7, '8, '9, '70, '71.

Total value of rents, with interest		$5,706 93
Mrs. Floride Calhoun's interest therein	$4,682 01	
Miss Cornelia " " "	1,024 92	
		$5,706 93

Statement showing the separate interest of the same estates in the mortgage bond.

Whole amount due on bond		$65,718 63
Mrs. Floride Calhoun's int. therein	$53,916 10	
Miss Cornelia Calhoun's " "	11,802 53	
		$65,718 63

6 The following statement shows the amounts finally recovered by the estate of Cornelia M. Calhoun and Floride Calhoun from the estate of A. P. Calhoun:

Thomas G. Clemson, Esq., in Account as Administrator of the Estate of Miss Cornelia Calhoun, Deceased.

This estate is derived from sale of mortgaged land and a *pro rata* share of the estate of A. P. Calhoun, deceased. Mrs. Floride Calhoun died 26th July, 1866.

The net amount of the sale of land under decree of foreclosure is the sum of		$14,725 00
By 6th clause of codicil the sum of $2,000 is given to J. C. Clemson before bequests take effect of bond and mortgage	$2,000 00	
Interest from 26th July, 1867, to 1st Jan'y, 1872	620 26	
		2,620 26
Land sales for division		$12,104 74
Mrs. Calhoun's interest:		
As 65,718.63 : : 53,916.10 : : 12,104.74 : : -----		$9,930 82
Miss C. Calhoun's interest:		
As 65,718.63 : : 11,802.53 : : 12,104.74 : : -----		2,173 91
		$12,104 73
Interest of Miss Cornelia Calhoun's estate in bonds, &c.		$2,173 91
Rent of Fort Hill from A. D. 1866 to A. D. 1871, inclusive (see Referee's Report, p. 15)	$5,276 33	
Deduct for improvements $431 00		
Do. for taxes 462 25		
	893 25	
	$4,383 08	
As 65,718.63 : : 11,802.53 : : 4,383.08 : : ------		787 05
Of available assets of estate of A. P. Calhoun, deceased (see Report, 13 p., and additional report of available assets), the referee reported the sum of	$5,630 78	
7 As 65,718.63 : : 11,802.53 : : 5,630.78 : : ----------	$1,011 24	
Rec'd under order of court by Thos. Thomson	1,000 00	
		11 24
		$2,972 20
Commissions off for adm'r at 5 per ct.		148 61
	7	$2,823 59

Heirs-at-law:

1. Mrs. Floride Calhoun, mother	
2. Mrs. A. M. Clemson, sister	$403 37
3. Mr. A. P. Calhoun, brother	
4. Capt. P. Calhoun, deceased, brother	
5. Mr. J. C. Calhoun	

6. Mr. J. E. Calhoun ----------
7. Mr. W. L. Calhoun ----------

$403 37

Share of each, $403.37.

NOTE.—The sum of $2,620.20 deducted above—

One-half is Mr. Clemson's	$1,310 13
One-half to Mr. Lee's daughter	1,310 13
	$2,620 26

Thomas G. Clemson, Esq., in account with the estate of Mrs. Floride Calhoun, deceased, as purchaser of Fort Hill, and as in receipt of rents and profits of Fort Hill from A. D. 1866 to A. D. 1871, inclusive.

Amount of sale of Fort Hill after deducting bequest of $2,000 and interest to J. C. Clemson, $2,620.26, and the part due the estate of Cornelia Calhoun, deceased, $2,173.91, viz. ----------			$9,930 82
8 Share of rents as shown in statement of Miss Cornelia Calhoun's estate, to wit:			
As 65,718.63 : : 53,916.10 : : 4,383.08 ----------			3,596 03
Available assets, see Report, p. 13, and additional report:			
As 65,718.63 : : 53,916.10 : : 5,630.78 : :		$4,619 53	
This sum is absorbed by—			
1st. Mrs. Floride Calhoun's purchases at sale ----------	$1,679 25		
Int. from Dec., 1865, to Jan'y, 1872 (gold) ----------	710 18		
	$2,389 43		
2d. Mrs. A. M. Clemson's purchases, $505 91 int. from 1868 to Jan., 1872, $161.65 ----------	667 56		
3d. Receipts by ex. from cl'k of c't and expended in payment of debts ----------	1,300 00		
4th. Bal. in clerk's hands ----------	262 54		
		4,619 53	
Amount of purchases and rents ----------			$13,526 85

This sum, $13,526.85, after deducting expenses and costs of administration, will be in the hands of Mr. Clemson as trustee, under the will of Mrs. Calhoun, of Mrs. Anna M. Clemson.

There is property pertaining to the estate, unconnected with the matter of Fort Hill, not included in the above account.

On the 9th June, 1875, the following order was made in the cause:

The mortgaged premises described in the pleadings having been sold by the order of this court in the case above stated and the same being confirmed and the purchaser, Thomas G. Clemson, the trustee of his wife, Anna M. Clemson, having complied with the
9 terms of sale, on motion of Edward Noble, plaintiff's attorney, it is ordered that the referee who made the sale, J. W. Stribling, Esq., make titles to the said mortgaged premises known as Fort Hill to said Thomas G. Clemson, as the trustee of his wife, Anna M. Clemson, under the will of Floride Calhoun, deceased, one of the plaintiffs.

June 9th, 1875.

T. H. COOKE.

The following conveyance was executed to Thomas G. Clemson:

J. W. Stribling, special referee, to Thos. G. Clemson, trustee.

Conveyance to Fort Hill.

THE STATE OF SOUTH CAROLINA:

To all — whom these presents shall come or be made known or whom the same may in anywise concern:

I, J. W. Stribling, as special referee of the county of Oconee, in the said State, send greeting:

Whereas Floride Calhoun and Thomas G. Clemson, adm'r, on or about the 12th day of March, in the year one thousand eight hundred and sixty-six, did exhibit their bill in equity to foreclose mortgage, &c., &c., in the court of equity, in the district of Pickens and State aforesaid, against Margaret Calhoun and others; and whereas, afterwards, the said cause was transferred for final hearing to the court of common pleas, in Oconee county, in said State; and the cause, being at issue before the honorable court aforesaid, came on to be heard on the 14th day of July, one thousand eight hundred and seventy-one, when the said court, after a full hearing thereof and mature deliberation in the premises, did order, adjudge, and decree that the real estate hereinafter mentioned and described should be sold at public auction by J. W. Stribling, as special referee, on the terms and for the purposes mentioned in said
10 decretal order, as by reference thereto on file in the said court will appear; and the said J. W. Stribling, as special referee, after having duly advertised the said real estate for sale by public outcry on the first day of January, in the year of our Lord one thousand eight hundred and seventy-two, did then, openly and publicly and according to the custom of auction, sell and dispose of the said real estate below described unto Thomas G. Clemson, as trustee for Mrs. Anna M. Clemson, for fifteen thousand dollars, he being at that price the highest bidder for the same: Now, know all men that I, the said J. W. Stribling, as special referee, in consideration of the premises, and also in consideration of the sum of three dollars paid by the said Thomas G. Clemson, trustee as aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and released, and by these presents do grant, bargain,

sell, and release, unto the said Thomas G. Clemson, as trustee of Mrs. Anna M. Clemson, her heirs and assigns, all that piece, parcel, or tract of land situate in the county of Oconee and State aforesaid and known as "Fort Hill," containing — acres, more or less, this deed of conveyance being executed and delivered by me pursuant to order of court, of which the following is a copy, to wit:

THE STATE OF SOUTH CAROLINA,
Oconee County.

In the Common Pleas.

FLORIDE CALHOUN and THOMAS G. CLEMSON, Adm'r,
vs.
MARGARET M. CALHOUN, DUFF G. CALHOUN.
Bill for Foreclosure, Account, &c., &c.

"The mortgaged premises described in the pleadings having been sold by the order of this court *in* the purchaser, Thomas G. Clemson, as the trustee of his wife, Anna M. Clemson, having complied with the terms of sale, on motion of Edward Noble, plaintiff's attorney, it is ordered that the referee who made the sale, J. W. Stribling, Esq., make titles to the said mortgaged premises, known as
11 'Fort Hill,' to said Thomas G. Clemson, as trustee of his wife, Anna M. Clemson, under the will of Floride Calhoun, deceased, one of the plaintiffs.

"(Signed) T. H. COOKE.

"June 9th, 1875."

The above order recites that the terms of sale have been complied with. If the compliance has been made it was not made by any payment to me, as a former order required, I having received none of the purchase-money in actual cash, except the sum of two hundred and seventy-five dollars, together with all and singular the rights, members, hereditaments, and appurtenances whatsoever to the said real estate belonging or in anywise appertaining and the reversions and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, dower, possession, property, benefit, claim, and demand whatsoever, both at law and in equity, of the said Margaret M. Calhoun and of all the parties to the said suit and of all other persons rightfully claiming or to claim the same or any part thereof by, from, or under them or either of them; to have and to hold all and singular the said real estate, with its hereditaments, privileges, and appurtenances, unto the said Thomas G. Clemson, as trustee aforesaid, his heirs and assigns forever.

In witness whereof I, the said J. W. Stribling, as special referee as aforesaid, under and by virtue of the aforesaid decree, have hereunto set my hand and seal, at Walhalla, S. C., this tenth day of June, in the year of our Lord one thousand eight hundred and seventy-five, and in the 99th year of the Sovereignty and Independence of the United States of America.

JESSE W. STRIBLING. [L. S.]

Sealed and delivered in presence of—
J. J. NORTON.
JOHN M. HUDSON.

12 The following letters appear in the record of the case of Calhoun *vs.* Calhoun:

PENDLETON, So. CA., *January* 9, 1868.

Mr. Edward Noble.

DEAR SIR: The sale to take place to-day at Fort Hill of personal property of my deceased brother Andrew is largely to be applied to the bond and mortgage debt, three-fourths of which comes to me by the will of my mother; the other fourth goes to my daughter Floride.

The estate of the mortgager will not be able to satisfy this debt, even if all his property sells at good prices, and if it goes low the sacrifice will be on my part. By my mother's will I am authorized to direct the investment of my legacy, with your consent. I therefore direct and request you to buy at the sale to-day such articles of property as in your judgment shall go below its value and at such prices as will justify the investment.

Yours truly, ANNA C. CLEMSON.

9 JANUARY, 1868.

DEAR SIR: I have read the within letter to you from my mother, and so far as I am interested in the bond-mortgage debt I concur with her that the property she alludes to should be bought in for us, if it goes at such low prices as will justify the purchase.

Yours truly, FLORIDE CLEMSON.

13 PENDLETON, 10 *January*, 1868.

Col. R. A. Thompson, com'r in equity, Pickens.

DEAR SIR: The purchases made by me yesterday were for Mrs. Clemson, who, with her daughter, owns the bond and mortgage on Fort Hill. I showed to you her letter directing me, as her trustee, to purchase such articles as in my judgment would be for her interest. The same also did her daughter, Miss Floride. I send this letter for your reading and also a correct copy of Mrs. Floride Calhoun's will. By the second clause of the codicil (pages 12, 13) three-fourths of the debt is given to Mrs. Clemson and by the third clause the remaining fourth is given to Miss Floride. The trusts declared and the appointment of trustee will be found in the 20th clause of the will (pages 5, 6 of the copy), which authorizes Mrs. Clemson to direct investments as she may choose, with the approbation of her trustee.

Therefore I desire that the purchases made by myself and Mr. Clemson yesterday at the sale may be charged to me, as trustee for Mrs. Anna C. Clemson, and may be delivered to Mr. Clemson, who will receive the articles and receipt for them in my name. Be so good as to make out bill of articles and let him have it for me. I

hope you will not fail to order accounting at the earliest day and will notify me by mail.

Very respectfully, &c., EDWARD NOBLE.

4. On 21st November, 1888, Gideon Lee made a conveyance to his daughter Isabella of all of his interest in the estate of his wife, Floride E. Lee, and especially in and to the Fort Hill plantation, containing 1,110 acres, and the income thereof. This deed has never been recorded.

5. On 13th December, 1871, Anna C. Clemson duly appointed Thos. G. Clemson as trustee under the trusts contained in the will and codicil of Floride Calhoun, deceased, in the place of Edward Noble, deceased, and T. G. Clemson accepted the same.

14 THE STATE OF SOUTH CAROLINA, *Anderson County:*

Whereas by the will of the late Mrs. Floride Calhoun, of Pendleton, dated June 27th, 1863, and by the codicil thereto attached, dated 22nd January, 1866, the undersigned, Anna M. Clemson, her daughter, is entitled to considerable legacies, the legal title of which is, by the will, vested in Edward Noble, Esqr., of Abbeville county, in said State, as trustee.

By the 20th clause of the will, confirmed by the 2nd clause of the codicil, the testatrix provides for a change of trustee in the following manner, viz: "If from death or any cause there is no trustee, or if Anna at any time shall desire to change her trustee, she shall have power so to do and to appoint another by any instrument in
15 writing, under seal, executed by her in the presence of two subscribing witnesses; and as often as she may desire to change her trustee she shall have the power so to do by observing the form and solemnity above described.

And whereas the said will and codicil are in the office of the probate judge for said county of Anderson, having been duly probated on the 7th of August, 1866, and letters testamentary granted to the said Edward Noble, as executor, on same date:

Now be it known that, in accordance with the power in me vested by the above-recited passage of my mother's will, I, Anna M. Clemson, of the said county of Anderson, do hereby nominate and appoint my husband, Thomas G. Clemson, of Pendleton, Anderson county, as trustee under the will, for the property therein bequeathed to me, and also for the property bequeathed me in the codicil, in
16 the place and stead of the said Edward Noble, who desires to be relieved from the trust.

Witness my hand and seal this 13th day of December, eighteen seventy-one.

ANNA M. CLEMSON. [L. S.]

Executed by Mrs. Clemson in our presence, who sign our names as subscribing witnesses therefor.

E. B. CALHOUN.
SALLIE B. CALHOUN.

I consent to accept and hereby accept the above appointment as trustee for my wife's property mentioned in the foregoing instrument.

THOMAS G. CLEMSON.

Dec. 26th, 1871.

UNITED STATES OF AMERICA }
District of South Carolina. }

In Circuit Court, Fourth Circuit.

I, J. E. Hagood, clerk of the said court, do hereby certify that the foregoing is a true copy of the original now on file in my office.

Given under my hand and seal of said court, at clerk's
17 office, in the city of Charleston, S. C., this 15th day of March, 1889.

J. E. HAGOOD,
C. C. C. U. S. Dist. S. C.

18 6. On 4th December, 1888, R. W. Simpson, as the executor of Thos. G. Clemson, deceased, submitted the following communication to the General Assembly of the State of South Carolina:

Communication from R. W. Simpson, executor of will of T. G. Clemson, deceased, accompanied by copy of said will and other papers relating thereto.

To the honorable the senate and house of representatives of the State of South Carolina:

As the executor of the last will and testament of the Hon. Thomas G. Clemson, deceased, I herewith transmit to your honorable bodies a certified copy of the last will and testament, copy of letters of administration granted to me, and a certified copy of the appraise bill, and respectfully request that your honorable bodies shall accept the property therein donated for and on behalf of the State.

R. W. SIMPSON, *Executor.*

December 4th, 1888.

STATE OF SOUTH CAROLINA, }
County of Oconee. }

Whereas I, Thos. G. Clemson, of the county and State aforesaid, did, on the 14th day of August, 1883, execute my last will and testament, wherein I sought to provide for the establishment of a scientific institution upon the Fort Hill place, and therein provided what sciences should be taught in said institution; and whereas I am now satisfied that my intention and purpose therein may be misunderstood, as intending that no other studies or sciences should be taught in said institution than those mentioned in said will, which was not my purpose or intention: Now, desiring to make my purpose plain, as well as to make some other changes in the disposition of my property than made in said will, I do

now make, publish, and declare this instrument as and for
19 my last will and testament, hereby revoking all previous wills and codicils by me made, especially the will above referred to, dated August 14th, 1883. Feeling a great sympathy for the farmers of this State and the difficulties with which they have had to contend in their efforts to establish the business of agriculture upon a proper basis, and believing that there can be no permanent improvement in agriculture without the knowledge of those sciences which pertain particularly thereto, I have determined to devote the bulk of my property to the establishment of an agricultural college upon the Fort Hill place. This institution I desire to be under the control and management of a board of trustees, a part of whom are hereinafter appointed, and to be modeled after the Agricultural College of Mississippi as far as practicable. My purpose is to establish an agricultural college which will afford useful information to the farmers and mechanics. Therefore it should afford thorough instruction in agricultural and the natural sciences connected therewith. It should combine, if practicable, physical with intellectual education, and should be a high seminary of learning in which the graduate of the common schools can commence, pursue, and finish a course of studies terminating in thorough theoretic and practical instruction in those sciences and arts which bear directly upon agriculture. But I desire to state plainly that I wish the trustees of said institution to have full authority and power to regulate all matters pertaining to said institution, to fix the course of study, to make rules for the government of the same, and to change them as in their judgment experience may prove necessary, but to always bear in mind that the benefits herein sought to be bestowed are intended to benefit agricultural and mechanical industries. I trust that I do not exaggerate the importance of such an institution for developing the material resources of the State by affording to its youth youth the advantages of scientific culture, and that I do not overrate the intelligence of the Legislature of South Carolina, ever distinguished for liberality, in assuming that such appropriations will be made as will be necessary to supplement the fund resulting from the bequest herein made.

20 Item 1. I therefore give and devise to my executor hereinafter named the aforesaid Fort Hill place, where I now reside, formerly the house of my father-in-law, John C. Calhoun, consisting of eight hundred and fourteen acres, more or less, in trust that whenever the State of South Carolina may accept said property as a donation from me for the purpose of thereupon founding an agricultural college, in accordance with the views I have hereinbefore expressed (of which the chief justice of South Carolina shall be the judge), then my executor shall execute a deed of the said property to the said State and turn over to the same all property hereinafter given as an endowment of said institution, to be held as such by the said State so long as it in good faith devotes said property to the purpose of the donation: Provided, however, That this acceptance by the State shall be signified and a practical carrying out be commenced within three years from the date of the probate of this my

will. During this term of three years or as much thereof as may elapse before the acceptance or refusal of this donation my executor shall invest the net produce of the land and other property, such invested fund awaiting the action of the Legislature and to form a part of the endowment of said institution, if accepted, or to form a part of the endowment of the college or school hereinafter provided for should the donation not be accepted by the State.

Item 2. The following-named gentlemen, seven in number, shall be seven of the board of trustees, to wit: R. W. Simpson, D. K. Norris, M. L. Donaldson, R. E. Bowen, B. R. Tillman, J. E. Wannamaker, and J. E. Bradley; and the State, if it accepts the donation, shall never increase the board of trustees to a number greater than thirteen in all, nor shall the duties of said board be taken away or conferred upon any other men or body of men. The seven trustees appointed by me above shall always have the right, and the power is hereby given them and their successors, which right the Legislature shall never take away or abridge, to fill all vacancies which may occur in their number by death, resignation, refusal to act, or otherwise; but the Legislature may provide as it sees proper
21 for the appointment or election of the other six trustees if it accepts the donation. And I do hereby request the seven trustees above named, or such of them as may be living or may be willing to act, to meet as soon after my death as practicable and organize, and at once to fill all vacancies that may have occurred and to exert themselves to effectuate my purposes as herein set forth. And I hereby instruct my executor to notify them of their appointment herein as soon after my death as practicable. The name of this institution shall be the "Clemson Agricultural College of South Carolina."

Item 3. Should the three years expire without the State accepting the donation in manner as hereinbefore provided, and, if accepted, at the expiration of three years from my death no practical beginning has been made to carry into effect the purposes of the donation, or if before the three years expire the Legislature shall refuse to accept said donation, then the donation to the State is hereby revoked, and my executor shall execute his trust by conveying the said Fort Hill place and the accumulated fund arising therefrom, together with all other property, real or personal, hereinafter disposed of and intended to be given to the said agricultural college as an endowment, to the seven trustees named above or their successors, who shall erect upon the Fort Hill place such a school or college for the youth of South Carolina as in their judgment will be for their best interest: Provided, that said school or college shall be for the benefit of the agricultural and mechanical classes principally, and shall be free of cost to the pupils, so far as the means derived from the endowment hereinafter provided and the use of the land may permit it. The trustees shall securely invest the funds hereinafter provided and given to said institution and hold them as a perpetual endowment, and shall only use the interest derived therefrom and the income of the land to support and maintain said school or college, except that the accumulated fund derived from the land and

the interest derived from the fund hereinafter given said institution from the time of my death, and as much as five thousand dollars of the principal fund may be used, if, in the judgment of the trustees, it may be necessary, to erect suitable buildings for said school
22 or college. The name of this institution shall be the "Clemson Scientific School or College."

Item 4. It is my desire that the dwelling-house on Fort Hill shall never be torn down or altered, but shall be kept in repair, with all the articles of furniture and *virtu*, which I hereinafter give for that purpose, and shall always be open for the inspection of visitors, but a part of the house may be used by such of the professors as the trustees may direct.

Item 5. I give and bequeath to my granddaughter, Flo. ide Isabella Lee, all of my silver plate and table silver; also all of the family pictures, except the large picture of John C. Calhoun now hanging in my sitting-room; also any one article in my present residence which she may select as a memento of me; also my decorations, and also the sum of fifteen thousand dollars ($15,000.00), to be paid to her on the day of her marriage or when she becomes twenty-one years of age, if unmarried: Provided, That if my said granddaughter should die unmarried and before she is twenty-one years of age, then all of said property mentioned in this item shall revert to and become a part of the residue of my estate and become subject to the trusts and conditions of items 1, 2, and 3 of this my will.

Item 6. I give and bequeath to my faithful housekeeper, Mrs. Jane Prince, one year's provisions for her and daughter, and furniture and bedding suitable to her condition sufficient to furnish two rooms, and the sum of three thousand dollars ($3,000.00), to be paid to her at the expiration of one year after the probate of this my will, and I also desire my executor to permit her to live at Fort Hill until he disposes of the property, as herein directed.

Item 7. I give and bequeath to Hester Prince, the daughter of my faithful housekeeper as aforesaid, the sum of three thousand dollars ($3,000.00), to be paid to her, or such person as may be selected by her and appointed her guardian, at the expiration of one year from the probate of this my will.

Item 8. I give to my executor, James H. Rion, as a memento of friendship, the antique intaglio Marcus Aurelius Antonius
23 sealing, which I habitually wear, and also such one of my pictures as he may select if the same is not selected by myself.

Item 9. I give and bequeath to my executor to be held by him, subject to the trusts and conditions of items 1, 2, and 3 of this my will, and for the purpose of adorning the Fort Hill residence as provided in item 4 of this my will, all of my permanent furniture, relics, and articles of *virtu*, pictures and paintings, including the large painting or picture of John C. Calhoun, now hanging in my sitting-room and not otherwise disposed of herein, and all my books.

Item 10. I direct my executor to sell at public or private sale, as he may deem best all the balance of my personal property upon my Fort Hill place, not herein disposed of, and to sell and convey all of

my real estate lying and situate outside of the State of South Carolina, either at private or public sale, as he may deem best, and to hold the proceeds derived therefrom, together with the proceeds of the personal property herein directed to be sold, subject to the trusts and conditions of items 1, 2, and 3 of this my will.

Item 11. All the residue and remainder of my property, of every kind and description whatsoever, after paying off the legacies above provided for, together with the property which may revert to my estate, should it revert thereto, and the proceeds of all my real and personal property herein directed to be sold and all accumulated funds derived from the Fort Hill place and interest on my investments, I give and bequeath to my executor, to be held by him subject to the trusts and conditions of items 1, 2, and 3 of this my will.

Item 12. I nominate, constitute, and appoint my friend, James H. Rion, the executor of this my will.

In witness whereof I have hereunto subscribed my name and affixed my seal before the witnesses below subscribing this the 6th day of November, A. D. 1886.

THOS. G. CLEMSON. [L. S.]

The above-written instrument was subscribed by the said Thos. G. Clemson in our presence and acknowledged by him to each one of us, and he, at the same time, publish- and declared the 24 same to be his last will and testament, and we, at his request and in his presence and in the presence of each other, have signed our names as witnesses hereto.

JAMES HUNTER.
T. O. JENKINS.
E. L. C. TERRILL.

STATE OF SOUTH CAROLINA, }
County of Oconee. }

I, Thos. G. Clemson, of Fort Hill, in the State and county aforesaid, do make this my codicil to my last will and testament, dated the 6th day of November, 1886, hereby confirming my said last will and testament, so far as the same is not inconsistent with this my codicil:

Item 1. I will and direct my executor to pay my debts and funeral expenses as soon after my death as practicable out of the proceeds of any part of my estate that is the most available.

Item 2. I hereby revoke the 11 item of my last will and testament as aforesaid, in which I appointed James H. Rion my executor of my will, he having recently departed this life, and I now do nominate and appoint my trusted friend, Richard W. Simpson, of Pendleton, South Carolina, my executor of my said last will and testament and of this my codicil thereto, and in my said last will and testament the name of James H. Rion, wherever it appears, shall be stricken out and Richard W. Simpson shall be inserted in place thereof.

Item 3. I revoke the 8th item of my said last will and testament, in which I gave James H. Rion my sealing ring and one of my pictures, which he may select, and I do now give and bequeath to R.

W. Simpson my sealing ring, which I habitually wear, and such one of my pictures as he may select.

Item 4. I do hereby revoke item 6 of my said last will and testament, which contains a bequest to my faithful housekeeper, Mrs. Jane Prince, she having been otherwise provided for.

25 Item 5. It is my will and I do direct that neither the legacy to my granddaughter in the 5th item of my said last will and testament or the legacy to Hester Prince in the 7th item of my said will shall bear any interest until the same are due and payable, as provided in the said items of my said will.

Item 6. I authorize my executor to purchase that portion of the original Fort Hill tract of land which — set off to Gideon Lee, guardian of Floride Isabella Lee, and the same if so purchased shall become a part of the Fort Hill tract of land, and shall go with and be disposed of as I have in my said will disposed of the Fort Hill tract.

Item 7. I will and direct my executor to sell, either at private or public sale and for cash or upon credit, both as he may think best, all the real estate of which I may die seized and possessed, except the Fort Hill tract of land, whether the same be situate in the State of South Carolina or outside of it.

Item 8. Should the chief justice of South Carolina decline to decide when the State of South Carolina has or has not accepted the donation given to it in the first item of my said will, then I give to my executor the same power as I in the said first item of my will gave to the said chief justice, and his decision shall be final.

Item 9. I hereby authorize and direct my executor to employ such persons as he may deem necessary to take charge of the Fort Hill dwelling-house and the articles therein donated and to manage the farm, and to pay the said persons such sums of money for their services as he may deem right and proper.

Item 10. In view of the great responsibility and labor which my executor will encounter in managing the affairs of my estate as directed in my said will, and in consideration of the great kindness he has shown to me and of the assistance in taking care of my business when I had no other person or friend to help me, I will and bequeath that he, my said executor, shall have, take, and receive, in addition to the usual commissions allowed by law to executors as commissions for receiving and paying out money, five per cent. of the appraised value of my entire estate, both real and personal.

26 Item 11. I desire to state here that my granddaughter, Floride Isabella Lee, has received the one-fourth part in value of the original Fort Hill tract of land, the part which her mother, under the will of Mrs. John C. Calhoun, was entitled to, the same having been appraised and set off to her by commissioners appointed by Mrs. Clemson and by Gideon Lee, her father and guardian, and she has also received through Gideon Lee, her said guardian, her mother's share of the estate of my son, John C. Clemson. Notwithstanding this fact, from a letter received by me some time ago from Gideon Lee I am led to believe that, as guardian of

my said granddaughter, he will make claim of my estate — a large balance alleged by him to be due my said granddaughter by me.

I therefore desire and direct my executor to examine closely into such claim if so made, and if he, my said executor, is satisfied that the claim so made is justly due by me to my said granddaughter to pay the same. But, on the other hand, if he is not satisfied that the said claim or claims are justly due by me, then he shall not pay it or them unless compelled by law to do so, in which case I hereby revoke so much of the bequest of fifteen thousand dollars given in the fifth item of my said last will and testament to my said granddaughter as will be equal to the amount which my said granddaughter may recover against my estate.

Item 12. The desire to establish such a school or college as I have provided for in my said last will and testament has existed with me for many years past, and many years ago I determined to devote the bulk of my property to the establishment of an agricultural school or college. To accomplish this purpose is now the one great desire of my life. I have not been unmindful of the interest of my said granddaughter, nor have I acted in this matter through any prejudice to any one. It may be possible that the disposition of my property as herein made may not give satisfaction to my said granddaughter or to Gideon Lee, her father and guardian, but I trust that neither the one or the other or any other person lawfully authorized by law to represent my said granddaughter will ever attempt to frustrate or defeat the purposes which I have
27 herein sought to accomplish, but will respect the settled desire of my life, as contained in this my will. But should my desire and request as herein expressed be ignored and should Gideon Lee, as guardian of my said granddaughter, or should my said granddaughter herself, or any other person lawfully authorized by law to represent her, or any person as her legated or distributed — of my said granddaughter in their right as such attempt to contest my will or attempt to invalidate it or attempt to change or alter it in any particular whatever, then it is my will and I do direct that such attempt or attempts to contest, alter, change or invalidate my said last will and testament or codicil hereof shall, as soon as commenced, work an absolute revocation of my entire and of all of my bequests to my said granddaughter, Floride Isabella Lee, as made in the fifth item of my said last will and testament, and then and in that case my said granddaughter, Floride Isabella Lee, shall receive no part of my estate whatever, and the money and articles mentioned in the fifth item of my said will shall go to my executor and be held by him subject to the trusts and conditions contained in items 1, 2 and 3 of my said last will and testament, provided that my executor may sell in manner as to him may seem proper any of the articles mentioned in said fifth item of my said last will and testament, except the family pictures. These shall be held by my executor subject to the trusts and conditions of items 1, 2, and 3 of my said last will and kept, with the other articles mentioned in the eighth item of my said last will and testament, to adorn the Fort Hill house.

Item 13. It is my will and I direct that my executor shall not be held liable for or responsible for any losses to my estate by reason of any errors of judgment or mistakes, as I am fully aware of the varied and responsible duties I herein have required of him.

This codicil is written in part on the fourth page of my said last will and testament, to which this sheet is attached, and which is dated November the 6th, 1886.

Item 14. I authorize and empower my executor to expend
28 such sums of money as he may deem necessary to keep the Fort Hill dwelling-house and premises in good repair and the Fort Hill farm in good condition.

In witness hereof I have hereunto subscribed my name and affixed my seal, before the witnesses below subscribing, this the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and eighty-seven (1887).

THOS. G. CLEMSON. [L. S.]

The above-written instrument was subscribed by the said Thos. G. Clemson in our presence and acknowledged by him to each one of us, and he at the same time published and declared the same to be his codicil to his last will and testament, and we, at his request and in his presence and in the presence of each other, have signed our names as witnesses hereto.

R. M. JENKINS.
C. W. YOUNG.
J. H. MOUNCE.

Letters testamentary on the estate of Thos. G. Clemson were duly issued to Richard W. Simpson on April 20th, 1888.

29 Attached to this communication is the inventory and appraisement of the estate of Thos. G. Clemson, deceased, aggregating $106,179.61.

Among the items of the property of the said estate so appraised are—

"Fort Hill" real estate, 814 acres $15,000 00

An act was passed by both the senate and the house of representatives of the State of South Carolina in December, 1888, accepting the devise in Mr. Clemson's will.

30 *Last Will and Testament of Anna C. Clemson, Deceased.*

THE STATE OF SOUTH CAROLINA:

In the name of God, Amen.

Whereas I am entitled to legacies under the last will of my deceased mother, Floride Calhoun, and to a distributive share in the several estates of my deceased sister, Cornelia Calhoun, and my brother, Patrick Calhoun, and, notwithstanding my coverture, have full testamentary power to dispose of the same:

Now, I, Anna Calhoun Clemson, the wife of Thomas G. Clemson, of the town of Pendleton, in the county of Anderson and State afore-

said, being of sound and disposing mind, memory, and understanding, do make this my last will and testament in manner following:

I will, devise, and bequeath the entire property and estate to which I am now in anywise entitled and which I may hereafter acquire, of whatever the same may consist, to my beloved husband, Thomas G. Clemson, absolutely and in fee simple; but should my husband, Thomas G. Clemson, depart this life leaving me his survivor, or should he survive me and then die intestate, in either event I will, devise, and bequeath my entire property and estate, as well as that which I may hereafter acquire, of whatever the same may consist, to my granddaughter, Isabella Lee, the child of Gideon Lee, of the State of New York, absolutely and in fee simple. I hereby nominate and constitute Thomas G. Clemson executor of this my will.

In testimony whereof I have hereunto affixed my signature and put my seal this twenty-ninth day of September, in the year of our Lord one thousand eight hundred and seventy-one, and in the ninety-sixth of the Sovereignty and Independence of the United States of America.

ANNA C. CLEMSON. [L. S.]

31 Signed, sealed, and published as and for her last will and testament by Anna Calhoun Clemson in presence of us, who, in her presence, subscribe our names as witnesses to the due execution thereof.

AMELIA NIECIESKA PINKIND.
E. B. CALHOUN.
T. J. PICKENS, JR.

I desire my dear husband, T. G. Clemson, to leave at his death, should he survive me, $500 to Maria Elizabeth Venning, in token of our appreciation of her devotion and fidelity; or should I survive him I hereby desire the said sum, should be paid her — my estate.

ANNA C. CLEMSON.

11. On 13th April, 1860, letters of administration on the estate of Patrick Calhoun were granted to Edward Noble, Esq., ordinary of Anderson district.

The following is the appraisement and the final settlement of the estate put in evidence by the defendant and the schedule of money and notes belonging to the estate and the annual returns put in evidence by the complainant:

Schedule of money and notes belonging to the estate of Patrick Calhoun, deceased, late captain in the Army of the United States, found by the administrator after his death among his papers and effects.

Money—Amount found	$3 00
Notes—1 on Andrew P. Calhoun, dated and due June 3d, 1857, interest at 8 per cent., eight thousand dollars	8,000 00

Notes—1 on Andrew P. Calhoun, dated June 3d, 1857, and due at 9 months, for one thousand one hundred and twenty dollars, interest at 8 per cent.. $1,120 00
" 1 on Andrew P. Calhoun, dated and due as above, for one thousand dollars, at 8 per cent. 1,000 00

The last two notes were found by the administrator, with the three dollars in cash, in a small pocket-book of the de-
32 ceased, uncancelled. The administrator, however, believes, from evidence brought to his attention, that these two notes have been paid and satisfied in full.

I certify that the above schedule is true and contains all the money and notes belonging to estate coming to his hands.

EDWARD NOBLE, *Adm'r.*

33 On 12 July, 1877, Edward Noble, adm'r, made his return showing paid May 2nd, 1875, to Mrs. Anna C. Clemson $150 on account of her distributive share, and also stating as follows: That on April 1st, 1875, he had received from estate of Cornelia Calhoun $601.94.

No receipts since 1875. Assets all collected. A. P. Calhoun's estate insolvent and paid nothing to simple contract creditors. Estate is ready for settlement.

NOTE.—Mrs. F. Calhoun received Confederate money, $500; therefore she takes no more besides; see 1st return for inventory taken by her. Mr. N. P. Calhoun is hereby indebted to estate, see 1st return, and therefore he takes nothing. The four distributees are, Mrs. Anna Clemson, two sons of Dr. J. C. Calhoun, deceased, living in Florida; estate James E. Calhoun, deceased, no administrator; estate Wm. C. Calhoun, deceased, James E. Calhoun, executor, Abbeville.

STATE OF SOUTH CAROLINA, }
Anderson County. }

Personally came Col. Edward Noble and upon oath says that the foregoing return is correct and true, exhibiting amounts received and paid out by him as administrator of said estate.

EDWARD NOBLE, *Adm'r.*

Sworn to July 12th, 1877, before me—

W. W. HUMPHREYS,
Judge of Probate.

34 On 28 August, 1877, Edward Noble, adm'r Patrick Calhoun, filed final return, showing that the distributive share of each heir in the estate was $120 49

Mrs. Anna C. Clemson, distributive share	$120 49
May 2d, 1875, he had paid her	150
Due adm'r	$29 51

12. On 23 January, 1866, the following petition for letters of administration on the estate of Cornelia M. Calhoun was filed in the office of the ordinary of Anderson district (put in evidence by complainant):

To the ordinary of Anderson district, H. Hammond, Esq.:

The undersigned, your petitioner, respectfully sheweth that Miss Cornelia Calhoun in 1857 died without a will, leaving an estate amounting to about nine thousand dollars ($9,000). Said estate consisted of a bond on her brother, Mr. Andrew P. Calhoun, since deceased, secured by a mortgage on the plantation known as Fort Hill. This mortgage debt will not realize more than one-third of the sum, and therefore Miss Cornelia's estate may be said to amount to about three thousand dollars.

35 Your petitioner further sheweth that it is necessary at this time that administration should be granted some one in order to collect this debt from the estate of the late Mr. A. P. Calhoun, which is largely insolvent. Your petitioner is brother-in-law to intestate, and prays that letters of administration may be granted him of said estate.

23 Jan'y, 1866.

THOS. G. CLEMSON.

Mr. Ordinary:

You will please send me a copy of the paper containing the notice.

T. G. C.

Pendleton, Anderson district, So. Ca.

Letters of administration were duly granted on 6th February, 1866, and on 13th March, 1866, the following inventory was filed of this estate:

To H. Hammond, ordinary of Anderson district:

Inventory of Miss Cornelia Calhoun's Estate.

PENDLETON, ANDERSON DISTRICT, S. C., *March 13th*, 1866.

This estate consists of an interest in a mortgage on Fort Hill, amounting to eight thousand and eight hundred dollars ($8,800), now in suit; also of an interest in Mr. John C. Calhoun, which is a remnant, amounting to an inconsiderable amount; also of an interest in the estate of Patrick Calhoun, her brother, supposed to be valueless, as the debt which constitutes the estate is due by the estate of Mr. A. P. Calhoun, known to be insolvent.

Patrick Calhoun's estate amounts to about $10,000 if the aforesaid estate of the debtor was solvent.

THOS. G. CLEMSON,
Administrator.

THE STATE OF SOUTH CAROLINA,
Anderson District.

I swear that the above return is true.
13 March, 1866.

THOS. G. CLEMSON.

Sworn to before me—

EDWARD NOBLE,
Notary Public.

36 UNITED STATES OF AMERICA,
District of South Carolina.

In Circuit Court.

ISABELLA LEE, by Her Next Friend, GIDEON LEE, Complainant,
vs.
RICHARD W. SIMPSON, Defendant.
} In Equity.

CHARLESTON, S. C., *March* 14*th*, 1889.

A reference was called this day on motion of Wells & Orr, Smythe & Lee, defendant's solicitors.

Present: J. P. Carey, Leroy F. Youmans, complainants' solicitors.

On motion of Orr and Smythe, defendant's solicitors, reference was postponed until to-morrow at 9.30 on account of the defendant, Mr. Simpson, being sick.

CHARLESTON, S. C., *March* 15, 1889.

Reference met at 9.30, according to adjournment.

Present: Smythe & Lee, Wells & Orr, defendant's solicitors, and Leroy F. Youmans and J. P. Carey, complainants' solicitors.

At a prior reference held by the complainant the following papers were introduced into evidence:

1st. Agreement of counsel. 2d. Agreement between Mrs. Floride Calhoun, Cornelia M. Calhoun, and A. P. Calhoun for the purchase of the Fort Hill farm. 3. Bond of Andrew P. Calhoun to Mrs. Floride Calhoun and Cornelia M. Calhoun for the sum of $49,000. 4.
37 Mortgage from Andrew P. Calhoun to Mrs. Floride Calhoun and Cornelia Calhoun. 5. Deed of Fort Hill and slaves to Mrs. Floride Calhoun, Cornelia and Andrew P. Calhoun. 6. Mortgage from Andrew P. Calhoun to Mrs. Floride Calhoun, Cornelia M. Calhoun, mortgage on Fort Hill. 7. Bill in equity of Mrs. Floride Calhoun and Thomas G. Clemson, administrator, *vs.* Mrs. Margaret Calhoun *et al.* 8. Answer to the bill in equity of Mrs. Margaret M. Calhoun *et al.* 9. The decree of Mrs. Floride Calhoun and Thomas G. Clemson *vs.* Mrs. Margaret Calhoun *et al.* 10. Decretal order to sell mortgaged premises to account, etc., Mrs. Floride Calhoun and T. G. Clemson, administrator, *vs.* Mrs. Margaret M. Calhoun *et al.* 11. Decretal order confirming the sale of lands, etc., Mrs. Floride Calhoun, T. G. Clemson, administrator, *vs.* Mrs. Margaret Calhoun *et al.* 12. Decretal order to execute titles to the pur-

chaser in the case of Thomas G. Clemson, administrator, *vs.* Mrs. Margaret Calhoun *et al.* 13. A deed from J. W. Stribling, special referee, to T. G. Clemson, trustee, title deed to Fort Hill. 14. Deed from Gideon Lee to Isabella Lee. 15. The bill that passed the Legislature accepting the Clemson devise and bequest from Thomas G. Clemson to establish an agricultural college in connection therewith. 16. Copy of the will of Mrs. Floride Calhoun, as set out in the answer, with the right to correct any inaccuracies therein within the next twenty days. 17. Instrument in writing substituting Thomas G. Clemson, as trustee under the trust of Mrs. Floride Calhoun's will, in the place and stead of Edward Noble, and Mr. Clemson's acceptance of said trust; defendants will produce the original.

38 RICHARD W. SIMPSON, defendant, being duly sworn, testifies as follows:

Q. Are you the defendant in this action?
A. Yes.
Q. Where do you live?
A. Pendleton, Anderson county, S. C.
Q. Have you lived there all your life?
A. Yes.
Q. How far do you live from Fort Hill farm, the residence of John C. Calhoun?
A. I am living now 3½ miles from there.
Q. Have you lived all your life in the neighborhood of that place?
A. Yes.
Q. Do you know the family of Calhouns?
A. Yes. Some of the old members I did not know.
Q. Did you know the late Mrs. Anna Clemson and Thomas G. Clemson?
A. Yes.
Q. What were your relations with her?
A. My relations with Mrs. Clemson were not very intimate. I was quite a young man. I knew her, but my relations with Mr. Clemson were of a close and intimate nature.

39 Q. Did you know the way of their business in the general way that people in the country know?
A. Yes; people in the country generally know the business of each other. I had such knowledge as one neighbor usually has of another.
Q. You knew Thomas G. Clemson very well?
A. I was—I might say I knew him well and intimately for a long time.
Q. Did it come within your knowledge whether or not Mr. Clemson considered the Fort Hill property, at which he lived, to be his individual property, owned by him in fee simple, or as trust property, owned by him in trust? And if within your knowledge, please state the facts connected therewith.

Complainant's solicitors object to the question on the ground that it is leading, irrelevant, and incompetent.

A. Some time between the year 1880 and 1882, some time between the two dates, Mr. Clemson came to me and told me he was desirous and had determined to donate the Fort Hill tract of land to the State of South Carolina for the purposes of an agricultural institution. I was a member of the Legislature at the time, and he asked me to tell him what steps were necessary for him to take to accomplish his purpose. I undertook to ascertain the proper methods for him to pursue and to let him know. I talked with some members of the Legislature at the time as to the probability of the State's accepting the donation upon the condition to be stated; among them, I got replies from Mr. Talbot, of Edgefield, and Judge Simonton. I had stated, however, to these members that there were no conditions attached to this donation except the one of establishing an agricultural institution. After that Mr. Clemson wrote to me and wanted * * *

Complainant's counsel object to the testimony of any letter unless the letter is produced.

Q. What became of that letter?

A. I don't know; burnt up—destroyed.

Q. Have you searched for those letters?

40 A. Yes; I have made careful search for all papers connected with this matter.

Q. Were they in your possession—this letter you speak of?

A. Yes; I remember one circumstance connected with that letter; it worried me. I was sitting in my room in Columbia, and in the unloading of my pockets of the letters I had received I laid Mr. Clemson's letter on one side intending to preserve it, and in taking up my papers and letters I, through mistake, took up Mr. Clemson's and must have destroyed it. I went over my papers, for I was anxious to preserve it, but I could not find it.

Q. What was the condition that Mr. Clemson wanted to annex to his proposed gift of the Fort Hill property to the State for an agricultural college?

A. This is the condition—that the State would consent to remove the remains of Mr. Calhoun to the family burying ground in the Episcopal Church yard at Pendleton. I replied to him that I had already in my conversation with the members told them that there were no conditions except the one specified, and it would put me in an awkward position, and I would not do that and stopped; that is as far as my connection with it.

Q. At that time and during this transaction, in what character or under what title did Mr. Clemson consider and hold himself out to you as owner of the Fort Hill property?

A. I don't know that he had any conversation then, any particular conversation. He spoke of Fort Hill as his own property, and I understood that he regarded it as his own property; he could not have regarded it any other way according to the conversation on

the subject, but after that I learned more definitely from him, but you asked me at that particular time.

Q. Did you or not after that time have any conferences or dealings with Mr. Clemson on this subject? And, if so, tell us in brief what was done.

Complainant objects on another ground, that he can't testify as to transactions between him and the gentleman he claims as his testator.

41 A. Some time in 1886, I think it was, Mr. Clemson consulted me as an attorney about some matters connected with the will, and after the death of Col. Rion he requested me to act as his legal advisor and attorney, which I undertook to do. During the intercourse that followed our relations, as just stated, he very frequently talked about how he came by Fort Hill; he remarked frequently that — the way he always distinguished Fort Hill as bond and mortgage of A. P. Calhoun, and he said in these communications * * *

Complainant objects to any parole testimony in the title of these lands.

A. That the only property he ever received from his wife was under this devise or bequest of her mother, Mrs. Calhoun.

No parole testimony can be offered as to the intention of Mrs. Clemson to pass that property under her will.

A. He spoke of the Fort Hill property as his property repeatedly from time to time, where he received it—where he got it from; he had received it through the will of his wife.

Q. What, if anything, did he have to say to you at that time as to the property he received under his wife's will or at his wife's death through her?

Question objected to.

A. He said that he and his wife, during her lifetime, had entered into or made an agreement to execute and had executed mutual wills, one to the other, and that they had promised each other that which one of them survived that he or she would carry out their joint purposes and donate that joint property to the State of South Carolina for the purpose of this agricultural institution.

Complainant objects on the further ground that the declarations are in his own favor, trying to establish by parole proof, and incompetent under section 400 of the Code of South Carolina.

42 Q. Did he say where or on what spot this agricultural institution was to be located under the joint agreement between his wife and himself?

A. Yes; he said it was to be located on Fort Hill tract of land or plantation, and he has further pointed out the spot where he wanted the main building to be erected on.

Q. As I understand, then, Mr. Clemson stated to you in your rela-

tions to him as confidential advisor, on more than one occasion, that he received under his wife's will and from his wife no other property than the three-fourths interest in Fort Hill plantation, as representing the original bond and mortgage of A. P. Calhoun. Am I or am I not correct in so understanding what you have stated?

A. Yes; that is what I have endeavored to state; I think I have so stated.

Q. From the general repute in the neighborhood, of which you said you were aware, as to the affairs of this gentleman and his wife, can you state whether she was known or believed to possess any other property at or about the time of her death than the interest in the said property under the will of Mrs. Floride Calhoun? And, if so, state the particulars of what you happen to know.

Complainant objects to the ownership of the property being proven by general repute, and also on the preceding ground of objection.

A. I don't think, as far as my general knowledge went, that Mrs. Clemson had any property except this under her mother's will; and, further, I have since Mr. Clemson's death examined all of her papers and his, and I find no evidence of any property belonging to Mrs. Clemson except what she was entitled to under the devise of her mother.

Q. Was the examination of the papers, which you have made since Mr. Clemson's death, thorough?

A. Yes; I think so; as thorough as I could make it; in fact I have examined each individual paper.

Q. Do I understand correctly that from the thorough examination of the papers of Mr. and Mrs. Clemson, since made after his death, the result of that examination was to satisfy you at the time
43 of her death she was interested in no other property—that is, she owned no other property which she could devise except that which came under her mother's will? Am I correct or not in what I understood you to have stated?

Question objected to as leading.

A. Yes; you are correct; I have made an investigation, and as far as the investigation goes I find her having no other property than that mentioned.

Q. Do you know Mr. Gideon Lee, the guardian of the plaintiff in this case?

A. Yes.

Q. Do you know the plaintiff, Isabella Lee?

A. I do.

Q. Have you seen either of these parties since Mr. Clemson's death or soon after?

A. Yes; both were at my house shortly after Mr. Clemson's death.

Q. They stopped at your house?

A. Yes.

Q. During that visit did you have any conversation with Mr. Lee about the affairs generally?

A. Yes; I talked to him freely and frankly about Mr. Clemson's affairs, and he talked freely and frankly to me about his own affairs; he told me——

Any testimony between Mr. Lee and Mr. Simpson is objected to as incompetent.

—about his having made a will and about his own private matters; that he had made a will, and I don't remember the particulars; he was talking freely and frankly, and that he had provided for each one of his children, giving to each one of them an equal share. I told him all about Mr. Clemson's affairs that I thought would be interesting to him; in fact I held back nothing that I knew, and I read him the will, Mr. Clemson's will.

Q. You say he spoke of his own affairs and Mr. Clemson's?

44 A. Yes.

Q. And told of the disposition he had made of his own property?

A. Yes.

Q. That he had left each of his children what?

A. Giving to each of them an equal share, if I remember correctly. I don't know why he was talking to me. It only showed the friendly manner that we were both treating each other.

Q. You spoke to him about Mr. Clemson's will?

A. Yes; I read it to him.

Q. Had you proved it at that time?

A. No; before it was probated. I told Mr. Lee I had been advised by my attorney to suggest to him that he might determine which way he would have me to probate this will. I told him under the laws of our State it could be proven in solemn or common form, and that if he desired I would have it probated in solemn form from the beginning.

Q. What did he say?

A. I don't think he gave me any distinct answer. He said he would examine into the matter.

Q. Did he give any intimation of a desire for it to be proven in solemn form?

A. No.

Objected to as leading.

Q. Did he say anything to you at that time—intimate to you any knowledge of Mr. Clemson's intentions with reference to Fort Hill property; and, if so, what?

A. We were talking of Mr. Clemson's property, I don't remember whether before or after we were talking of the personal property. He remarked that he had known for years that it was Mr. Clemson's intention to donate Fort Hill to the State; that he had known it years ago.

Q. It was during that interview that Mr. Lee told you he had made ample provision for his own children in his own will?

A. Yes; he was at my house during this time. He was there

on three occasions during the same week. I don't know
45 which one of the visits he came down and stopped a day and night. I don't know if he stopped or not the first time he came down from Seneca City. I think this conversation was the last time. He was at my house on the third visit when the will was read.

Q. And at the same time he told you he had made ample provision for his own children in his own will?

A. Yes.

Q. You proved the will?

A. Yes, in common form, before the probate judge at Oconee.

Q. Did you have any sale of personality in connection with the Fort Hill property?

A. Yes.

Q. In what capacity did you act?

A. As executor of Thomas G. Clemson.

Q. Was that advertised?

A. Yes.

Q. Mr. Lee attended that sale?

A. Yes.

Q. Did he take any part in it?

Objection continued.

A. He bought a good many things at the sale and paid for them.

Q. Paid you as executor for the articles he purchased?

A. Yes.

Q. Do you know whether Miss Isabella Lee knew that you were the executor of the will and qualified?

A. Yes; I think she did. I went with her and her father to Fort Hill, and when I got there I told her to go to the different rooms and drawers of Mr. Clemson, and any personal memento she desired to keep to take it, as she would prize them more than anybody else, and she did so, and with her presence and help I had all the silver brought out and an inventory made and I took it with me to put away in a safe place.

Q. Did anything occur at the time you were in the house with her to make her know you were executor?

A. Several times she was doubtful. She was very particu-
46 lar about not taking anything that would be improper. Sometimes when in doubt she would ask her father, and he said he could not say anything; she must ask me—I was the proper person for her to ask.

Q. Why?

A. He did not say anything further than referred to me. I was in charge. I had charge of the matter.

Q. Her father referred her to you. Did she have apprehensions or not whether she could take the articles she desired?

A. Yes.

Q. Do you happen to know whether Edward Noble is alive?

A. I have never heard he was dead.

Q. Do you believe him to be alive?
A. Yes.
Q. He is in Abbeville now, to the best of your knowledge?
A. The last I heard he was in Fairfield.
Q. Do you know whether John or William Calhoun had any children?
A. I know the two brothers had three sons and one of the three is dead; which one I don't know. The others are alive.

Cross-examination by Gen. YOUMANS:

Q. Was not Col. J. H. Rion Mr. Clemson's legal adviser up to the time of his death?
A. He was.
Q. Were you ever his legal adviser before the time of Mr. Rion's death?
A. In 1886, I think, some time in October, Mr. Clemson came to me to consult me about his will, and he wanted me to suggest some amendment he wanted to put in his will in shape that he might send them to Col. Rion to add a codicil or make the changes in his will. I attempted to put it in shape for him and he told me in that connection that he had written to Col. Rion to come up and change his will, but that Col. Rion had told him that he had received
47 the letter from him and could not get up before the next May, and he said he was getting too old to postpone a matter of that kind. After making two or three efforts to state the changes he wanted to make he turned round and asked me if I could not write the will myself. I declined to do it and told him that Col. Rion was his legal adviser and it would not be courteous on my part to do it. Then he appealed to me to do the act, and on the inability of Col. Rion to get there I did so.
Q. You drew the will for him?
A. I drew the will that is on proof here.
Q. That was executed in Col. Rion's lifetime?
A. Yes.
Q. And that was drawn by you?
A. Yes.
Q. The codicil is after Col. Rion's death?

Defendant's counsel call attention to the fact that this examination of the making of the last will and testament of Mr. Clemson is no matter in reply to any testimony brought out by them in their direct examination, and as to this matter the witness is the witness of the complainants.

Complainant says it is not his testimony, but the testimony of the defendant himself, of which he was not asked.

Q. When did Col. Rion die?
A. I think he died very shortly after the execution of that will; no, I think it was some time in 1886, some time about the first of December, the latter part of the year or the first of 1887.
Q. The codicil of the will was drawn by you after Col. Rion's death?

A. Yes.

Q. The conversation which you have stated as to what Mr. Lee said of the disposition of the property—this conversation occurred at your house when Mr. Lee was your guest?

A. Yes.

Q. At your invitation?

A. Yes. I understood Mr. Lee to be my guest at my invitation; he had not been invited that particular time, but he had been invited beforehand.

48 Q. Tell us the sisters and brothers of Mrs. Clemson that you know of.

A. Andrew P. Calhoun.

Q. When did he die?

A. I don't remember the year; I remember when it occurred.

Q. He died about March, 1865. Who after Andrew?

A. I don't know that I can state them in regular order; Capt. Patrick Calhoun.

Q. When did he die?

A. I don't know; I was not home when he died; I don't know except by hearsay.

Q. That is the one that went to California?

A. No, he was in the army.

Q. Was he ever married?

A. No.

Q. Died about when?

A. I can't state except by inference by the letters of administration; I could not state to my knowledge.

Q. Died unmarried about 1859?

A. I don't know.

Q. What was the other one?

A. John.

Defendants make the same objection to this testimony as to the will of Thomas G. Clemson.

A. I don't know the order in which they died. I merely know the general facts. I have a knowledge of the fact that they died; but when I can't remember.

Q. You don't know when he died?

A. No.

Q. What other children?

A. William Lowndes.

Q. You don't know when he died?

A. No; then I think there was one James Edward; he was the one that went to California. I don't remember him at all.

Q. Was that all the boys?

A. Miss Cornelia and Mrs. Clemson constituted the family.

Q. Do you know who drew this will of Mrs. Clemson's?

Defendants object that it is not in reply to any evi-
49 dence brought out by complainants, and that this witness is the witness of the complainant.

A. I heard Mr. Clemson say that Mr. Armstead Burt drew it.
Q. He was a very distinguished lawyer?
A. Yes; so considered.

In Reply.

Q. Do you know anything of your own knowledge as to who drew Mrs. Clemson's will?
A. Not at all.
Q. When Mr. Clemson was telling you who drew the will of Mrs. Clemson did he tell you the will was drawn for the purpose of vesting in him the Fort Hill property?

(The question is objected to as incompetent.)

A. It was in that connection, he told me, they had executed mutual wills and had entered into an agreement, by which the survivor, Mrs. Clemson, willed to him her property and Mr. Clemson willed his to Mrs. Clemson; that the survivor carry out that purpose and donate to the State that joint property for this institution.
Q. Did he during that conversation in which he stated to you that Mr. Burt had drawn Mrs. Clemson's will state that the purpose and intention of drawing that will was to vest in him any title and right left her or under her mother's will?

(Objected to.)

A. He did not say it in those words.
Q. Was that the idea he conveyed to you?
A. Yes; that is the idea he conveyed to me at that time.

(Objected to as incompetent.)

Q. I understood you to say you did not know what had become of James Edward Calhoun?
A. No; except what I see on the record.
Q. You did not know him personally?
A. No.
Q. And John and William died leaving children?
A. Yes.
Q. I understood you to say that Mr. Clemson's will left by him was drawn by you prior to Col. Rion's death. You consented to do that by the request of Mr. Clemson?
50 A. Yes; I refused, and have given my reasons. I would not have done it then, except at his earnest solicitations.
Q. And I understood that you incorporated some changes that he was anxious to incorporate in the will?
A. Yes.
Q. Mr. Gideon Lee has been twice married?
A. Yes.
Q. And has children both by his first and second marriage?
A. So I understood it.

Reference adjourned until further notice.

Dr. THOMAS J. PICKENS, being duly sworn, says:

He was born in this neighborhood, Pendleton; is 58 years of age, and is a practicing physician; son of Thomas J. Pickens and grand-nephew of old Governor Andrew Pickens; has lived all his life in this neighborhood.

Knew Mr. and Mrs. Clemson very intimately, and has known them ever since he can recollect. Mrs. Clemson was a second cousin of witness' father. The relations of the two families were
51 very intimate. Deponent was a witness to Mrs. Clemson's will. Witness knew well Mrs. Clemson's circumstances and what property she had.

Q. At or about the time of Mrs. Clemson's death did she or not own or have any other property than that over which she had an interest or control through the will of her mother, Mrs. Floride Calhoun, and at that time represented by the Fort Hill plantation?

Objected to:

1. Because this testimony seeks to contradict the will itself, which asserts that she had other property.

2. The will being such an instrument that the possession at any time of realty or personalty, or both, would satisfy its words, any inquiry as to whether or not she had any property is incompetent.

3. It is irrelevant under the pleadings made in this case.

4. Otherwise incompetent.

A. She had no other property that I knew of.

Q. Were or not your relations with her such that you would have known had she been possessed of other property?

Objected to as incompetent and irrelevant.

A. They were. My business relations with the Calhoun family were intimate. I was present at the reading of the will of Mrs. Calhoun; I was thus familiar with the money interests of these parties, including Mrs. Clemson, and would have known had she had any other property. I acted as agent for the executor of Mrs. Calhoun, Mr. Noble, in delivering the legacies under her will to the administrators and heirs of A. P. Calhoun. I acted also as agent of the executor in reference to the Calhouns in Florida, who were the grandchildren of Mrs. Calhoun. Their names were John C. Calhoun, B. P. Calhoun, and W. L. Calhoun. The two first were sons of Dr. John C. Calhoun, and the last was the son of William Lowndes Calhoun. I took receipts from the administrator of A. P. Calhoun for the legacies turned over to him as administrator, and turned over
52 the receipts to the executor. This all made me familiar with the settlement of the estate. The settlement was while Mrs. A. P. Calhoun was in possession of Fort Hill.

I was familiar afterwards with the settlement of Mrs. Calhoun's estate. I had a full knowledge of all the provisions of her will. From all this it is probable I would have known if Mrs. Clemson had any other property.

Persons are sometimes secretive about their own affairs. He has lived in this neighborhood all his life; known the general repute in which Mrs. Clemson was held as to property.

Q. Was or was not Mrs. Clemson at the time of her death reputed to have any other property than that coming to her through her mother's will?

Objected to on fourth ground above stated as to ownership of property, and further as to proving the ownership of property by general repute.

A. Not that I knew of; knew the late Thomas G. Clemson.

Q. Did he or not ever say anything to you about Mrs. Clemson and himself having made mutual wills; and, if so, what did he say?

Objected to — 1. Their wills are in testimony and must speak for themselves, and no parole testimony as to either of them can be offered, there being no ambiguity as to either.

2. Any declaration on Mr. Clemson's part in his own favor is incompetent.

3. Complainant demands any parole between them as to wills is void; the law, demanding such agreement to be in writing, cannot demand the production of any such.

4. Mr. Clemson's declaration as to his wife's wishes is incompetent here, or his own either.

A. He said in donating Fort Hill to the State he was carrying out his wife's wishes as well as his own. He said nothing as to mutual wills.

53 (Cross-examination, subject to objections heretofore made by complainant:)

Only acted as agent of Mr. Noble, executor, in delivering the legacies mentioned in her will to the administrator of Andrew P. Calhoun. These legacies were small and minor to all. I suppose enough to satisfy the law. Acted as agent for the property in Pendleton (now owned by Mrs. Cornish) for the Florida Calhouns, after Mr. and Mrs. Clemson left it and went to Fort Hill.

Don't recollect exactly when Mr. Clemson moved to Fort Hill. It was not until after the death of his son and daughter.

Knows nothing of settlement of estate of Patrick Calhoun, or of John C. Calhoun, Senior. Always considered that the estate of the latter consisted of Fort Hill and some gold mines near Dahlonega, Ga. Not familiar with the settlement of the estate of Cornelia Calhoun. In reference to the estate of John Calhoun Clemson, one thousand dollars was sent to Mr. Lee for his daughter, and kept the other thousand for himself or his wife. Mr. Clemson told him so.

Mr. Clemson moved to Fort Hill the year after John Calhoun Clemson died. Knows nothing about any silver or jewelry that Mrs. Clemson had. Knows nothing about the silverware now held by the estate of T. G. Clemson, except that Mr. Clemson told him that most of the solid silver Mr. Clemson told him he had bought in Europe. He did not say who he bought it for; he simply said "I bought it." This as to most of the solid silver. Knows nothing further as to the ownership of any of the silver.

In Reply.

John Calhoun Clemson had nothing at his death that witness knew of except the legacy left him by his grandmother, Mrs. Calhoun.

Re-cross-examination:

Calhoun Clemson owned a watch and a horse given him by his father, a gun, two mighty nice pointers, and some shirt-studs and other personal effects.

54 J. MILES PICKENS, being duly sworn, says:

He is a brother of Dr. Pickens; has lived here all his life, except for about 7 or 8 years just after the war; knew Mrs. Clemson intimately.

Q. Did or did not Mrs. Clemson, at the time of her death, to your knowledge, own any other property than that in which she had an interest under her mother's will?

Objected to on the same grounds made to similar questions asked Dr. Pickens.

A. Not that I know of. My relations were intimate with her and her family. I think I would have known of any other property if she had any.

Mrs. CATHERINE D. CORNISH, being duly sworn, says:

She is the widow of Rev. A. H. Cornish, who was rector of the Episcopal Church, in Pendleton; is 69 years of age; knew Mrs. Clemson and her family well; the relations between Mrs. Clemson and witness were those of the closest ties of friendship; she talked very freely with witness about her own affairs.

Q. Did or did not Mrs. Clemson ever speak to you of the disposition she wished made of the Fort Hill property; and, if she did, what did she say?

Objected to—1. Irrelevant under the pleadings.

2. Law requires such disposition of realty to be in writing. Mrs. Clemson's will is in and must speak as to the disposition of Fort Hill.

3. Mrs. Clemson's will is in and must speak as to her wishes as to the disposition of any property.

4. Any parole testimony is incompetent to change, vary, or contradict any of those wills, especially the declarations of either of the makers of them.

A. She said her views were in accordance with those of her husband and would be carried out if she survived him, and that was to give it to the State for an agricultural college. She talked to me repeatedly about this college.

55 Q. What object did she profess to have in view in desiring Fort Hill property to be donated to the State for an agricultural college?

Objected to as leading and expressive of an opinion as to the intent of another.

A. The benefit of her country. These talks were principally after the death of her son.

Q. Do you know whether the death of her son had any effect on this purpose of Mrs. Clemson's; and, if so, what was it?

Objected to as an opinion and seeking to go outside of a written instrument for intent.

A. Mrs. Lee, her daughter, died only two weeks before her son. She felt heart-broken at these troubles, and that she and her husband desired that everything that they both could do should be done for the benefit of the upper country of South Carolina. She spoke of this agricultural college to be founded on Fort Hill for the benefit of the young men of the State as a fitting monument to the memory of her son. She frequently spoke of this.

The whole of this answer is objected to on grounds stated as to the question and as otherwise incompetent.

Q. Did Mrs. Clemson and yourself ever have any conversation as to the provision which she intended to make for her granddaughter, Isabel Lee; and, if so, what was it?

Objected to on the ground that Mrs. Clemson has made that provision in her will, and any parole testimony is incompetent to affect it.

A. Yes; we had a great many conversations concerning it. She refused after her last visit to the North to give anything to her granddaughter at her death except a case which was given
56 her by her father, John C. Calhoun, as a wedding present, consisting of some silver. The reason alleged was that Mrs. Clemson wished to have her little grandchild live with her during her life, but the father said he could not spare the child.

Objected to as hearsay. Both Mrs. Clemson's and Mr. Lee's declarations are hearsay.

Q. During these conversations did she or not refer to her purpose and desire that Fort Hill should be donated to the State for an agricultural college; and, if so, what did she say about it?

Objected to:

1. Her will contains her provisions on this subject, so far as she could effect it, and cannot be gone outside of.

2. Her wishes as to what others should do with her property is incompetent and irrelevant here and is hearsay.

A. Yes; she stated she desired such disposition to be made of the Fort Hill property very ardently and very emphatically.

Q. Did she or did she not state to you what arrangements she and Mr. Clemson had made for the purpose of having this intention carried out by the survivor; and, if so, what arrangements did she say had been made?

Objected to:

1. Any parole testimony as to that intention contradicts the will itself.

2. No parole testimony can be given as to the intention of either Mr. or Mrs. Clemson.

3. Such agreement must be in writing and its production is demanded.

4. It is hearsay and otherwise incompetent.

A. She said that they had made mutual wills to each other, donating their property to each other, and the survivor was to carry out this purpose and donate the whole to the Statefor this agricultural college at Fort Hill. She stated that Mr. Clemson was
57 in full accord with her wishes and intentions in this respect—to have Fort Hill donated as an agricultural college. Witness was very familiar with Mrs. Clemson's affairs.

Q. Do you or do you not know whether, at or about the time of Mrs. Clemson's death, she owned any other property than that over which she had an interest under her mother's will and then represented by the Fort Hill property?

Objected to on the four grounds made to Dr. T. J. Pickens' testimony on same point.

A. I never heard of her then owning any other property at all. Our relations were such that I would have known it if she had.

Cross-examination, subject to objections made:

A. Knows nothing about the legal proceedings by which the estates of John C. Calhoun, Patrick Calhoun, Cornelia Calhoun, and J. C. Clemson and Mrs. Floride Calhoun were settled up; knows these estates were very small indeed; that they owned very little. Mrs. Clemson told witness that she got very little from her sister and brother. These conversations testified to were had with Mrs. Clemson both before and after she made her will. All that witness has testified to was from Mrs. Clemson herself in reply.

In stating that the estates were very small indeed witness refers principally to those of Patrick Calhoun and Cornelia Calhoun, not to Mrs. Calhoun.

Rev. H. W. McLees, being duly sworn, says:

He is minister of the Presbyterian Church; 58 years old; has been intimate in this neighborhood since October, 1866; knew the late Mr. and Mrs. Clemson very well; knew them since about 1867, until the time of their deaths.

Q. Do you or do you not know what were Mrs. Clemson's intentions in reference to the Fort Hill property and what purpose she desired it put to? If so, please state from whom you learned them and what they were.

58 Objected to on the five grounds made to a similar question asked Mrs. Cornish, and also on the four grounds made to Dr. Pickens' testimony. These objections to hold good to all the testi-

mony of this witness or any other witness hereafter to be examined on similar points.

A. I learned these intentions from herself. She wished it to go to the State of South Carolina for the purpose of founding a college for agricultural instruction. She said that the boy part of the population of South Carolina suffered very much from want of knowledge; that they could not help themselves very much without it; that it was the oft-repeated expression of her father, John C. Calhoun, that we should educate the boys and that after they had grown old enough to go to college they could educate themselves.

Objected to as hearsay.

During her lifetime there was an effort made to start such an institution on Fort Hill. The annexed circular was issued during her lifetime, with her knowledge and approval. She selected the parties who signed it as a committee and they were invited into her presence for conference by witness. This committee failed at that time to carry out the purpose desired.

Circular put in evidence and marked as Exhibit —.
Objected to as hearsay.

Mrs. Clemson had frequent conferences with witness on the subject of the establishment of a State agricultural college at Fort Hill up to 1874. These conferences continued up to the last interview witness had with her, which was about 7 or 8 months before her death. Mr. Clemson shared fully in this purpose and intention of Mrs. Clemson. Witness saw Mr. Clemson seldom after his wife's death, but their relations continued intimate.

Q. Did he or did he not speak to you concerning the Fort Hill property—to whom it belonged and as to his wife's wishes in reference to it? And, if so, state fully what he said.

59 Objected to—

1. As irrelevant.
2. Declarations in his own favor.
3. An attempt to prove what was in Mrs. Clemson's mind by the declarations of a third party.
4. As not the proper proof of the ownership of Fort Hill, the same being fixed by the records in this case.
5. And as otherwise incompetent.

A. I heard that he had willed the property to the State for an agricultural college and went to see him to ask if it was so. I was at the time engaged in another agricultural college scheme in this neighborhood, and hearing this about Clemson went to ask him, knowing that if it were so my scheme was up. I wanted, before giving up my scheme, to satisfy myself with a personal interview with Mr. Clemson of his intentions. He told me he had in his will donated the property to the State for an agricultural college; that Mrs. Clemson had seriously requested him not to sell or in any way alienate Fort Hill so that it should not go to the State for an agri-

cultural college; that he had promised Mrs. Clemson that he would respect her wish.

Objected to as hearsay.

A. Mrs. Clemson frequently stated to witness that she wished, when the agricultural college was established at Fort Hill, to have a tablet placed in the chapel of the institution to the memory of her father. Witness knew the neighborhood here well; never knew or heard of Mrs. Clemson having any other property than Fort Hill.

This last clause objected to on the same grounds as made to similar testimony by Dr. Pickens.

The college scheme referred to by witness as occasioning his visit to her, Mrs. Clemson, was based on the donation of a tract of land by a Mrs. Walker for such an institution.

Cross-examination, subject to objections made:

The parties named in the circular were selected by Mrs. Clemson herself. The circular was prepared by Wm. Henry
60 Trescott, and handed to witness by Mrs. Clemson in presence of Mr. Clemson; don't know why it is stated on page three that the offer was made by Mrs. Clemson herself; suppose he did it as her representative. The men's names were given witness by Mrs. Clemson, Mr. Clemson being present; does not remember Mr. Clemson picking out any of them; does not know that Mr. Clemson had more to say about it than her; it was the joint desire of both parties to have Fort Hill transferred to the State; did not regard Mr. Clemson as the main mover in the matter; thinks the prime idea was hers. Mr. Clemson was acceding to what she was doing and consenting to it, but it was her idea. This circular was prepared by Mr. Trescott at the request of Mr. and Mrs. Clemson and given by them to witness; thinks the portion relating to the agricultural college in France went in with the knowledge of Mr. and Mrs. Clemson. He understood from them that Mr. Trescott drafted it. It was given as a whole to the committee and subscribed by them.

Mr. Clemson was a man who looked after his own affairs; does not think that, as a general rule, he called on his wife to manage his affairs; has heard that about that time Mr. Clemson was negotiating to sell Fort Hill to the State for about $20,000.

Objected to as hearsay.

In the offer made to the committee he there proposed to donate a portion of Fort Hill outright to the State for the college and to sell the balance, but the committee were unable to pay the price for the balance.

Mr. and Mrs. Clemson both expressed the wish that when the college was founded the remains of John C. Calhoun should be buried there.

In Reply.

When witness saw Mr. Clemson, after his wife's death, which he did three or four times, he stated to him that he had donated the entire property to the State for an agricultural college. He stated that he did this in order to fulfill the promise he had made to his wife.

61 *Scientific Education.*

Address to the people of the State.

The undersigned, having organized themselves into an association for the purpose of establishing an institution of learning in the State of South Carolina, which shall, as far — possible, supply the place of the venerable college which has been destroyed by the Legislature, and which shall furnish an opportunity for the education of that portion of the people of the State who, in the present political condition of its affairs, are practically excluded from all participation in the advantages of those educational establishments, which they are heavily taxed to support, confidently appeal to their fellow-citizens for their aid and sympathy.

Without further reference to the painful condition of public affairs, it is sufficient to recognize the fact that the political power which controls the State has deliberately effected snch changes in the management of the South Carolina college as to destroy its usefulness by degrading its character. The whole body of the professors—men venerable for their years, their abiiities, and their character—have been removed without even the pretence of cause, only because their lives had been devoted in service and sacrifice to the State. Their places have been filled by men who neither by learning, ability, or reputation command the confidence of the community. A system of mixed admission has been adopted, which has closed its doors to all of its accustomed students—a system so prejudicial to the interests and so repugnant to the feelings of all classes in the Commonwealth that Congress, sustained by the administration, has just refused to sanction it by national legislation, while the avowed purpose of these changes is to belittle the past history, to destroy the old traditions, and to obliterate forever the old character of South Carolina.

The undersigned are perfectly aware of the whole breadth and depth of the political and social revolution which has been worked at the South by the result of the late civil war. Without complaint they accept it in all its fullness. They have no mission to
62 defend the errors of the past, and they are not foolish enough to attempt to check the will of God. To that great body of their fellow-citizens to whom the war brought freedom and political rights they feel nothing but good will, and they would not interpose the slightest obstacle to any progress they can make or desire to make in their own improvement. Heavy as the taxation they

bear, they would feel themselves amply repaid if every year found the colored citizen of the State better informed as to his duties, more capable of comprehending his true interests, and nearer to the level of moral and intellectual culture of the white man; but representing the race they do they feel that they have filled no obscure or dishonorable place in the history of the country; that their contribution of courage, of culture, and of character to the national life has not been inconsiderable, and that the great Union at whose very existence they struck in obedience to what they had been taught from childhood was their duty would scarcely consent to see eliminated from the national character that purity of private life, that devotion to public duty, that obligation to pledged faith, that well-balanced order of public policy combining in harmonious action the interests of property and the intelligence of the popular will which formed the traditional standard of Carolina life. Indeed, rather would the national heart rejoice that these virtues, for virtues unquestionably they are, should be preserved to exercise their wholesome and elevating influences upon that common future which is now broadly open to the country freed from an institution which perplexed the conscience of one-half of the nation and in self-defence forced a sectional policy upon the other.

The undersigned feel, therefore, that in establishing such an institution their first duty would be to put it under such influences, to surround it with such associations, as will preserve the moral tradition of the State and encourage an intellectual freedom not inconsistent with a true and loyal veneration for its past history. This achieved, the undersigned feel that, connected with this spirit and elevated by it, the most urgent need of the State is a system of education which will fit its young men to deal with the new condition in which their lives are to be matured. One of the
63 results of the great social revolution through which the South is passing, and a result perhaps not altogether to be regretted, is that the State is, as it were, commencing life anew; a life in which every citizen is required to be a worker and in which the character and prosperity of the State is dependent upon the energy and intelligence with which that work is prosecuted. In the present condition of the world's culture, the undersigned do not think argument necessary to show that what is needed is scientific education. Everywhere industrial pursuits and the development of material resources are shaping the future power and influence of nations; and with us, especially, after the devastation of civil war and the destruction of property consequent on the abolition of slavery, it is evident that our first need is to restore the wealth of the State, and that success can only be commanded by an intelligent and energetic use of the knowledge which science supplies.

Sheltered by the Blue Ridge Mountains on one side, exposed by its open coast line to the genial and prolific influences of the Gulf Stream, with a soil rich in itself and capable of unlimited improvement, well watered and well wooded from the rice-fields of its delta, all through the broad zone of its cotton culture up to the wheat and oat land that run up to the slopes of its mountains, it presents an

area for human industry that in older and better educated countries would be crowded with a thrifty and prosperous population; while its mineral and manufacturing resources contrast sadly in their abundant profusion with countries which have grown rich and famous by the intelligent development of a tithe of its hoarded and wasted material wealth. But these resources cannot be reached or used without knowledge. As an illustration of the direct effect of this scientific knowledge upon the material prosperity of a country, they would commend the following fact to consideration:

"In 1818 Dombasle established the agricultural college of Roville. For several years that establishment was a blessing to France. Records of its practical and experimental agriculture were
64 published and with the best effects; but at last Dumbasle had sunk health and fortune and the college stopped. It was spoken of as a failure. Was it a failure? Two young men quietly went out from it and wrote an answer on the soil of France—wrote it in letters so deep and wide that it will never be effaced. The first of these young men went out upon the wretched barren heaths of Brittany; took over 12,000 acres—brought to bear upon it the science and practice he had learned at Roville and produced a noble and fertile farm. That farm is now the seat of an agricultural college and a center from which has radiated scientific and practical knowledge for the reclamation of all that part of France.

"Another pupil, M. Neviere, went forth. He went to the south-east of France. There he found, near the confluence of the Rhone and Saone, a district of sixty-seven square leagues—a marsh, supposed to be irreclaimable, with a population dying of fever. He took a farm of 1,600 acres, applied methods learned at Roville, and reclaimed it in two years. The reclamation of the remainder followed, the fever rate sank from twenty per cent. to one-half per cent. of the farm hands! The district is now the seat of a thrifty, healthy population, and in the midst of it stands the Agricultural College of "La Saulsaie," a centre of scientific and practical knowledge for all parts of France.

"At the Imperial College of Grignon they showed me a map of France all dotted over. Each of these dots represented a graduate. There they were, in every corner of the country, each man thoroughly trained in the best science and practice of agriculture. And justly, indeed, is that institution proud of their character and influence."—President White, of Cornell University.

Their object, then, is to establish a scientific school which would prepare the youth of the State to become intelligent workers in the material development of the State. They do not underrate what may properly be called a higher culture. They do not undervalue the grace and the glory of arts and literature, but they know that arts and letters are the development of accumulated wealth and that with material prosperity they are sure to come, provided that there is national character enough to prevent such prosperity
65 from degenerating into a mere greediness after money, and they know of no surer preventive to such degradation than the proper study of science, which, while it makes knowledge sub-

servient to the wants and comforts of humanity, impresses, even in its most utilitarian teachings, the presence of great laws, which require patient and unselfish labor for their comprehension and obedience and humility in their application.

The undersigned think that they have found in recent events a fitting opportunity for the effort which they propose to make.

Whatever be the estimate placed upon his political career, however men may differ upon the soundness of the political principles which he lived and died to vindicate, no one but feels that Mr. Calhoun was the highest representative of character and intellect that this State has given to history. Pure in his private life, almost to austerity, devoted in his public life to his sense of duty, with an unselfishness of purpose that commanded the respect and admiration even of those who differed from him most widely and bitterly, clinging with singular tenacity to the sentiment and prejudices of his native State, and yet identified with the highest achievements of the Union, loving both the one and the other with a love that could not be divided and could not be reconciled, he died the highest representative of all that the State had been in the Union. His home has been for more than one generation an object of reverential pilgrimage, and the sentiment of our people still heightens the picturesque beauty of its situation with the warmth and glow of human affection.

His immediate representative, the Hon. T. G. Clemson, his son-in-law, and who is himself well known from his scientific reputation, his diplomatic service, and the ability with which he administered the Agricultural Department of the Patent Office, sharing the opinions which the undersigned have endeavored to express, has offered to them land at Fort Hill as a site for such an institution as they propose to establish.

This site, comprising some of the finest land on the Seneca
66 river and at the foot of the Blue Ridge Mountains, combines great beauty of situation with exceptional healthfulness of climate. It is situated in a section of the State cheap and abundant, exempt from many of the disadvantages which might affect such an institution elsewhere, and is within a short distance of two great trunk railroads—the Blue Ridge road connecting the up-country with Charleston and Columbia and the Air-Line road passing within a mile and connecting New York and New Orleans.

The undersigned has received assurances of aid from other sources, both able and disposed to give liberal assistance.

They feel that no nobler monument could be raised to the great Carolinian than such an institution on the spot where the tradition of his great and beautiful life would be most strongly felt, and where the youthful mind of the State could be trained to take up his work under altered circumstances, and benefit by the unexpected but fixed solution of problems which perplexed his judgment and disturbed his patriotism. And however widely different the political and social life they may be called to lead, they are sure that to no people could be presented a higher exemplar of public and private

virtue than his life-long devotion to the country and the Constitution.

As soon as a sufficient amount has been subscribed to justify the practical commencement of their work, the necessary legal conveyances of this property will be executed, and those interested will be called together to select a board of trustees to whom the completion of its organization will be confided.

In conclusion, the undersigned would ask that portion of the press of the State which sympathizes with their effort to publish this address and commend its consideration to the people of the State.

BEN. SLOAN, *Chairman.*
A. H. CORNISH.
J. W. LIVINGSTON.
A. N. ALEXANDER.
H. W. McLEES.
JOHN H. MAXWELL.
J. W. CRAWFORD.

Pendleton, S. C., Aug. 9, 1874.

67 RICHARD W. SIMPSON, already sworn:

Witness found the paper handed to him among the private papers of Mr. Thomas G. Clemson after his death; cannot undertake to swear to the handwriting.

(Put in evidence and marked Exhibit —.)

Objected to on the ground that it is not properly proved and that it does not come from the proper place to be offered in evidence in this case. It should come from the probate judge's office.

In a communication published in the News and Courier, of Charleston, dated April 4th, 1888, in reference to Mr. Clemson's estate, Mr. Gideon Lee writes this sentence, "The Fort Hill estate, 825 acres or thereabouts, the farming value of it about ten thousand dollars."

68 The following agreement was entered into with the consent of both parties:

It is agreed that Mr. Robert Gourdin would testify as a witness of the complainant; that he and his brother served as trustees under the Boisseau trust for T. G. and Anna C. Clemson from the 22nd November, 1886, to about the year 1880; that during the greatest part, if not all, of said period the net income derived from said trust annually varied from $230 to $270.

Under this trust the income went to Mrs. Anna C. Clemson during her life, and at her death to her husband, Thomas G. Clemson.

69 Pat. Calhoun testified that, to the best of his recollection, Mr. Clemson took possession of Fort Hill in 1866 or 1867. It may possibly have been in 1868, but not later than that. He took possession of the house in 1872. He had possession of the property

several years before we left the house. We had possession of the house and stable lot near to the yard. The balance of the property was in possession of Mr. Clemson.

Also as follows:

So far as the estate of John C. Calhoun was concerned, its interest in the Dahlonega gold mine stopped on the sale to him for $410. After deducting costs, the net proceeds for *proceeds for* division of the Dahlonega gold mine were $370, Mrs. Clemson's share being one-fifth.

70 Testimony taken at Abbeville, S. C., 19th April, 1889, J. P. Cary being present for complainants, James L. Orr for defendants.

E. B. CALHOUN, being duly sworn, says:

I was a witness to the will of Mrs. Anna C. Clemson. The will was prepared at Pendleton by Mr. Burt. I copied the will that was signed at his request. It was an exact copy; I suppose it was exact. Armstead Burt was a lawyer of fine reputation; practiced at Abbeville. I lived 2½ miles from Fort Hill all my life up to 1871 or 1872. I lived at Keowee. I then stayed part of one year (1873) at Fort Hill; was well acquainted with that plantation; about
71 200 acres bottom land; some very fine. Probably 250 acres outside of bottom was in cultivation. I was one of commissioners who ran out, about April, 1873, for Isabella, her one-fourth of Fort Hill. Fifty acres of bottom went to Floride and fifty or sixty upland in cultivation, making about 100 acres of the above-cultivated land went to Floride. Reese Hunnicut had land worked for Mr. Clemson in years of 1872 and '73; average crops made; good deal of corn. A man named Cochran came in '75. I suppose average crops made. Average rent for whole place during 1872, '3, '4, '5 were worth about $700 or $800. Floride's part was worth $200, taken from this. I have no personal knowledge of what the whole plantation made; just suppose it was average; don't remember any freshets those years. I knew Edward Noble; he is dead; died 14th inst., in California, I learn from papers. I was present at sale of personalty of A. P. Calhoun. A considerable portion, furniture, was bid in for Mrs. Clemson, and, I think, some silver; think it was 1866 or in 1867. Mrs. Clemson said partition mere form. It would all be Floride's some day; lived at Fort Hill and worked a small farm 1873. I heard Mr. and Mrs. Clemson talk of selling Fort Hill to Trescott's committee. I think the price was something like $20,000. My relations with Mrs. Clemson were of the kindest sort; did not hear her speak of giving this property to State for agricultural college; talked to me freely.

x. There were two wills made at the time Mrs. Clemson made her will, one for her and one for Mr. Clemson, leaving their property to each other, very similar. I copied both.

The upland was pretty fair, but the bottom land was the most valuable part, and the crops depended on high water. I have no

personal knowledge of what was made, simply speak of average crop. Mrs. Clemson and Mr. Clemson often discussed higher education and technical education for the up-country. She was much interested in it. He talked about it a great deal. The discussion was to sell for a college of some kind. There was talk of giving a portion of the place for this purpose—about 60 acres. I am not certain that any part was to be given. The talk of selling was about 1874.

72 Mrs. SALLIE CALHOUN, being duly sworn, says:

I knew Mrs. Anna C. Clemson well—intimately; knew her from '69 to her death; lived six miles from her—we at Keowee and she at Micassar. We were on best terms. I have heard Cousin Anna (Mrs. Clemson) say that the pictures of the family were hers. I know of two of her father; there were two of Cousin Anna. I am not sure whether Mr. Clemson gave her the one he painted of her or not. There were pictures of Floride Calhoun Clemson; these are large pictures. There was a picture of Floride Bouman, which Mrs. Clemson gave to us. The pictures other than portraits were picked up while they were in Europe. I don't know which they belonged to. They spoke of them as theirs, and both of them tried to get me to try to sell. Mrs. Clemson pointed out a good many handsome bronzes; she said they were hers. Some were at Fort Hill and others at Altoona. My recollection is that they were valued at several hundred dollars.

(Handing witness a list—appraise bill.)

Can you point out any articles which belonged to Mrs. Clemson? If I were there I might point them out. The large sideboard with Sicilian horns was given to her father, and I supposed belonged to her. I have heard her say the French bedsteads were hers—one large and other small—washstand, and such as that. They were at Micassar, and were given to Mrs. Clemson at the death of her mother, which occurred the latter part of the war—immediately after.

(Object, because, being personal property, they belonged to husband, his marital rights having attached.)

Cousin Anna told me that all the furniture and things at Fort Hill belonged to her. She told me this in 1873.

After Mrs. Clemson's death Mr. Clemson and Mr. Burt were on intimate terms for a number of years—about three years; then there was a coolness. Mr. Burt told me he said he never knew why.

While I lived with Mrs. Clemson she told me more than once. One time she said the survey for partition was a mere form; that one day the whole place would be Floride's.

73 At another time she said she believed in property going to the nearest of kin. I was at Fort Hill when they had a letter from Mr. Trescott—I think the one in evidence; she said to me she

merely consented to a sale of the place to satisfy his whim, knowing that the price was so much they would not pay it.

None of the personal property that I have spoken of—furniture, pictures, bronzes, or anything—were acquired after 1866. All that I know of their getting after that was a carpet and some chairs made in the neighborhood and a stove. The full-length portrait of Mrs. Clemson was painted by Mr. Clemson. He also painted one of himself, by looking in the glass. The handsome portrait of Mrs. Clemson was painted at Brussels, while Mr. Clemson was minister there, at the same time and by the same artist the two pictures—one of Floride and the other of Calhoun—were painted.

At the time Mrs. Clemson told me the property would one day go to Floride Isabella she also said that if Isabella predeceased her then the property would be left to Martha and Sarah, my oldest daughters; she said that she had directed Mr. Burt to add that as a codicil to her will at the same time that the $500 was given to Maria E. Venning.

Maria E. Venning is alive; lives in Charleston. I saw her at the unveiling.

April 19, 1889.

74 On 12 July, 1877, Edward Noble filed the following application for discharge as executor of Floride Calhoun:

SOUTH CAROLINA,
Anderson County.

In Court of Probate.

ESTATE Mrs. FLORIDE CALHOUN
ex parte
EDWARD NOBLE, Executor.

To W. W. Humphreys, Esq., judge probate Anderson county:

The undersigned respectfully shows the court that the estate of Mrs. Floride Calhoun is ready for final settlement; that no more assets in this estate are to be collected and all debts are paid; that the only outstanding interest of the estate is about one-seventh or one-eighth interest in a gold-mining property in Georgia, near Dahlonega, and that interest by the will is given to certain persons, who can take care of their interests in the same.

The undersigned therefore asks the court to take proper steps by publication, according to law, to order on a day named a settlement of said estate, and that the executor may be discharged.

July 12, 1877.

EDWARD NOBLE, *Executor.*

15. On 30th July, 1866, Thomas G. Clemson was appointed administrator of Hon. John C. Calhoun. On 26th January, 1867, he filed the following final return in the matter of this estate:

Thomas G. Clemson, Administrator, in Account with Estate of John C. Calhoun, Deceased.

DR.

Jan'y 26, 1867. To am't rec'd of Messrs. Appleton, New York	$529 88	
To int. on $529.88 for one year and 7 months	59 02	
	$588 90	

CONTRA. CR.

By am't paid Dr. J. C. Calhoun as per rec'pt	$114 71
" " Mrs. A. Clemson " " "	114 71
" " Jas. E. Calhoun " " "	114 71

75 UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

In the Circuit Court. In Equity.

ISABELLA LEE, by Her Next Friend, GIDEON LEE, Complainant,
against
RICHARD W. SIMPSON.

I, James E. Hagood, clerk of said court, do hereby certify that the foregoing extracts of testimony in above cause (the same, by agreement of counsel, to form a part of the record) is a true and correct copy of the original now on file in this office.

Seal U. S. Circuit Court, District of So. Carolina.

Given under my hand and seal of said court, at clerk's office, in the city of Charleston, this 2nd day of January, A. D. 1890.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Endorsed on cover: Supreme Court U. S. 1889, October term. No. 1418. Isabella Lee, by her next friend, Gideon Lee, appellant, *vs.* Richard W. Simpson. Stipulation of counsel and addition to record.

[Stamped:] Office Supreme Court U. S. Filed Jan. 14, 1890. James H. McKenney, clerk.

Office Supreme Court U. S.
FILED.
JAN 11 1890
CLERK.

IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1418.

ISABELLA LEE, BY HER NEXT FRIEND GIDEON LEE, APPELLANT,

vs.

RICHARD W. SIMPSON, APPELLEE.

Appeal from the Circuit Court of the United States for the District of South Carolina.

BRIEF OF COUNSEL FOR APPELLANT.

LEROY F. YOUMANS,
COUNSEL FOR APPELLANT.

COLUMBIA, S. C.
CHARLES A. CALVO, JR., PRINTER.
1890.

IN THE SUPREME COURT

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No. 1418.

ISABELLA LEE, BY HER NEXT FRIEND GIDEON LEE, APPELLANT,

vs.

RICHARD W. SIMPSON, APPELLEE.

Appeal from the Circuit Court of the United States for the District of South Carolina.

BRIEF OF COUNSEL FOR APPELLANT.

STATEMENT.

Mrs. Floride Calhoun departed this life the 25th day of July, A. D. 1866, leaving of force her last will and testament and codicil thereto (pages 22 to 30 of Transcript of Record), whereby she gave to her daughter Anna M. Clemson, wife of Thomas G. Clemson, an oil portrait of her (testatrix's) mother absolutely, and the beneficial interest as *cestui que trust* during the life of the said Anna, for the sole and separate use of the said Anna, in certain property, the most notable part of which was three-fourths of her (testatrix's) interest in a debt due her by her son, Andrew Calhoun, for the purchase of the Fort Hill plantation, amounting to about forty thousand and two hundred dollars, secured

by bond and mortgage. She made Edward Noble trustee for the interest given to her daughter Anna, and vested in him the legal title thereto: the remainder of the entire estate in said property, that is, the *corpus* of the entire property, after the beneficial interest of the said Anna, as *cestui que trust* during the life of the said Anna, for the sole and separate use of the said Anna, had ceased, she gave to her granddaughter Floride, daughter of the said Anna, with a limitation over to Calhoun Clemson, brother of the said Floride, to take effect in the event that Floride died without issue. Mrs. Calhoun further provided in the codicil to her will, that if Fort Hill should be purchased with the aforesaid bond and mortgage debt (which was done), Fort Hill should pass under her codicil, the same as the aforesaid bond and mortgage debt. Besides the interest (above stated) given to the said Anna, the testatrix, Mrs. Calhoun, also gave to Anna a *power of appointment*, by last will and testament duly executed by Anna, to dispose of the *corpus* in which she held a life estate as aforesaid. At the time of Mrs. Floride Calhoun's death a married woman could not make a will, that is, declare with effective force the manner in which she would have *her* property or estate disposed of after her death. On the 27th day of January, A. D. 1870, an Act was passed, entitled "An Act to carry into effect the provisions of the Constitution in relation to the rights of married women," 14 Stats. So. Ca., 324. That Act is in these words: "A married woman shall have power to bequeath, devise or convey her separate property in the same manner and to the same extent as if she were unmarried."

John Calhoun Clemson, son of Thomas G. Clemson and the said Anna, and the brother of Floride, died intestate and unmarried August 10th, 1871, and the said Thos. G. Clemson administered on his estate. Floride, the daughter of Anna and granddaughter of Floride Calhoun, intermarried with Gideon Lee on the day of August, 1869, and died intestate on 27th August, 1871,

leaving issue, alive, to wit: Isabella Lee, the sole issue 9
of that marriage, and the complainant herein. On the
29th day of September, A. D. 1871, Mrs. Anna C.
Clemson made her last will and testament, which she
left of force at her death, the 27th September, A. D.
1875, in which she schedules her own property, states
what right she has to dispose of the same, and disposes
of all she has and that which she may hereafter ac-
quire. Transcript of Record, page 49. All the prop-
erty therein mentioned being only her own which she
had the right to dispose of under the Statute aforesaid 10
mentioned, conferring upon a married woman a new
power, to wit: the power to dispose of her separate
property. Under proceedings to foreclose the bond
and mortgage in which Mrs. Calhoun had bequeathed
the aforesaid interest, title was made on 10th June, 1875,
to Thomas G. Clemson, his heirs and assigns, as duly
substituted Trustee of his wife, the said Anna. In fact
Thomas G. Clemson held continuous possession of the
Fort Hill plantation from 1872 to the fifth of Novem-
ber, 1873, and held possession of three-fourths thereof 11
from the last mentioned date to the day of his death,
April 6th, 1888, receiving the rents and profits thereof,
his title thereto being as substituted Trustee in lieu of
Edward Noble The Complainant, granddaughter of
Thomas G. Clemson and his wife Anna, their sole de-
scendant, and the sole issue of the marriage of Floride,
daughter of said Anna and Thomas, brings this suit
after proper allegations and statements, praying that
Richard W. Simpson, the Defendant, claiming absolute 12
title under Clemson, who is in possession of three-fourths
of the said Fort Hill plantation and of the accumulated
income, rents, issues and profits thereof, and has re-
ceived the income, rents, issues and profits thereof since
the death of said Thomas G. Clemson, be required to
account to the Complainant therefor; and that the
trusts whereon Clemson held the property be declared,
and that the cloud upon the title of the Complainant to
the property be removed, and the Complainant be

13 adjudged to hold the Fort Hill plantation in fee simple absolute. That the said Simpson account for the personal property in which the said Anna had a life estate and in which the Complainant had an estate to follow that life estate; and that said Simpson be restrained from making any deeds of the property in question which might in any manner tend to cloud the title of Complainant or defeat her rights as asserted. Besides the writ of subpœna, writ of injunction was specially prayed to restrain Simpson from
14 executing any deed of the Fort Hill plantation, or any part thereof, to any uses or purposes which would cloud the title of Complainant, or in any manner tend to defeat her rights as asserted, or from assigning or transferring any of the accumulated income, rents, issues and profits of said plantation. That injunction was granted (pages ~~39~~, 40 of the transcript of the record) 35— and is still in full force (page 54, folio 122, of the transcript of the record). The Defendant's answer was duly filed (pages 14 to 21 of the record). By the de-
15 cision of the Circuit Court all the objections made by Defendant to Complainant's recovery were decided adversely to Defendant except one, to wit: The question whether the will of Mrs. Clemson was such an execution of the power of appointment conferred on Mrs. Clemson by the will and codicil of Mrs. Calhoun as to convey to Mr. Clemson, the husband of Mrs. Clemson, the *corpus* of the property, a beneficial interest in which as *cestui que trust* during the life of the said Anna had
16 been given by the will of Mrs. Calhoun for the sole and separate use of the said Anna. That question has been decided by the Circuit Court in favor of the Defendant. If that decision is correct this appeal must fail. If there is error in that decision this appeal must succeed.

ASSIGNMENTS OF ERROR.

17

I. That there is error in the principle of law laid down by the Circuit Court as governing this case, to wit: That "a general devise or bequest may be construed as including real or personal estate of which the testator has a general power of appointment unless a contrary intention appears by or can be deduced from the will." The principle of law governing this case, as Appellant contends, is this: that a power of appointment will not be held to be executed only in three 18 cases:

1st. Where there is some reference to the power of appointment in the instrument claimed to execute the power of appointment.

2d. Where there is some reference to the property on which the power of appoinment is claimed to be exercised in the instrument claimed to execute the power of appointment.

3d. Where the provision in the instrument claimed to execute the power of appointment can have no 19 operation except as an execution of the power of appointment; and besides—

1. That in the instrument claimed to execute the power of appointment, the intention to execute that power must be so apparent and clear that the transaction is not fairly susceptible of any other interpretation; and—

2. That in such instrument must be found not only such intention so clearly manifested as aforesaid, but in the same instrument must also be found the actual carry- 20 ing out of that intention.

II. That there are errors in the conclusion drawn by the Circuit Court from the terms used by Mrs. Clemson in the appointment of a new Trustee, 13th December, A. D. 1871.

a. That Mrs. Clemson treated the *corpus* of the property, in which she had a beneficial interest as *cestui*

21 *que trust* for life, as being as much hers as her distributive shares in the estates of her sister and brother.

b. That "even if she possessed only a power over and not an interest in the *corpus* of the property, it would be altogether too narrow and technical a construction under the circumstances so to limit the language, 'I will, devise and bequeath the entire property and estate to which I am now in anywise entitled, and which I may hereafter acquire, of whatever the same may consist,' as to exclude the exercise of the power."

22 *c.* That while "the mention of the distributive shares allows it to be said that the instrument might have some effect by means of that interest, this would not be all the effect the words import; and if the intention to pass all can be discovered, it would seem that such intention ought to prevail"

d. "The intent to dispose of all the estate here is apparent upon the face of the will; and as the will plainly refers to the property covered by the power, its words cannot be satisfied unless the instrument
23 operates as an execution of the power."

Whereas, as Appellant contends, it is evident from the terms used by Mrs Clemson in the appointment of a new Trustee, as to *a*, that she did not treat the *corpus* of the property, in which she had a beneficial interest as *cestui que trust* for life, as being as much hers as her distributive share in the estates of her deceased sister and brother, but, on the contrary, refrained from saying anything about the *corpus* of said property, and
24 spoke only of her beneficial interest as *cestui que trust* for life therein devoted to her sole and separate use; as to *b*, that being possessed of only a power over and not an interest in the *corpus* of said property, it is not only not a too narrow and technical construction under the circumstances to so construe her disposition of the property and estate to which she was entitled and might afterward acquire to the exclusion of the exercise of her power of the disposition of the said *corpus*, but was the proper and exact language to express her idea

of disposing of her own property, and not of the *corpus*, over which she had only a power of appointment, unless it be contended that she was bound to negative the idea by direct expression in her will; that she was not disposing of the *corpus*, over which she only had the power of appointment, which contention if made has no *locus standi* in the law governing this case. As to *c:* That the power to dispose of the distributive shares of her sister and brother is put by Mrs. Clemson precisely upon the same ground on which she puts her power to dispose of the interest which she took under the will of her mother, Mrs. Calhoun, and so put correctly by her, to wit, the legislation of the State of South Carolina. As to *d:* That the intent to dispose only of her own property which she could dispose of as her own is plainly apparent upon the face of the will; and that the will plainly refers to her own property and not to any other property is plainly expressed, unless it be contended as aforesaid that in order to negative the idea that she is not disposing of property which is not her own she must say so in terms, which contention, whatever support it may have under other laws than that governing this case, has no foothold to support it in the law which must govern this case. 25 26 27

III. That there is error in the Circuit decision that by Mrs. Clemson's assertion of full testamentary power to dispose of her property, notwithstanding her coverture, she refers to the power of disposition given by her mother's testament rather than to her legal capacity, because *a:* The power of appointment in her mother's will did not give her power to dispose of anything she did dispose of in her will. 28

b. Because the power given her by her mother's will was a mere power of appointment (in no sense a testamentary power, which is the power of disposing of *one's own property*,) to be exercised simply in the mode and formalities of a will.

c. Because her power to dispose of her interest in

29 her brother and sister's estate is put by her precisely upon the same footing as her power to dispose of the legacies under her mother's will; and as there is no pretense that she derived the power to dispose of her interest in her brother and sister's estates from her mother's will, so also there can be no pretense that she derived her power to dispose of her legacies under her mother's will from the power conferred upon her by her mother's will.

d. The power given by her mother's will could have
30 no possible relation to the disability of testamentary power attendant upon her coverture, but the power conferred by her mother's will was one which neither in the conference or exercise of the power ever had the slightest relation to the coverture or discoverture of the donee of the power.

e. Because full testamentary power, the power under which Mrs. Clemson said in her will she acted, by no possible construction of its terms could give her the power to dispose of the *corpus* of the property, in which
31 she had only a beneficial estate for life for her sole and separate use, or of any other property which was not her own.

IV. That there is further error in these conclusions of the Circuit Court:

a. That Mrs. Clemson in her will referred to the property upon which she had the power to exercise the right of appointment.

b. That she referred to the power of appointment.
32 *c.* That it was Mrs Clemson's intention to exercise her power of appointment over the *corpus* of the said property.

d. That she carried out this intention in the due execution of the power of appointment.

"The main question for determination," as the Chief Justice says in the Circuit decree, "is whether the property," (*i. e.*, the *corpus*, in which Mrs. Clemson had a beneficial interest as *cestui que trust* for her sole and

separate use during life,) "passed by the will of Mrs. 33
Clemson as in due execution of the power under the
will and codicil of Mrs. Floride Calhoun." This, in
fact, is the sole question for this tribunal to determine.
In discussing it, the

I. *First* inquiry is by what law this question shall be determined? Appellant answers, unhesitatingly, by the law of South Carolina.

In the case of *Sewall* vs. *Wilmer*, 132 Massachusetts, 131, cited by the Chief Justice in his Circuit decree, 34
in which the opinion was delivered by his Honor Associate Justice Gray, now of this Court, then the Chief Justice of the Supreme Judicial Court of Massachusetts, the question was:

"Whether the construction and effect of Mrs Wilmer's will, relied on as an execution of the power conferred on Mrs. Wilmer by her father's will, were to be governed by the law of Massachusetts or by the law of Maryland." In that case her will was executed in 35
Maryland, her place of residence at the time of the execution of her will and at the time of her death was Maryland, and was there duly admitted to probate, and was also admitted to probate as a foreign will in Massachusetts. Her husband, the sole devisee and legatee under her will, and her children, who were the remaindermen to take under her father's will in default of her executing her power of appointment, also resided in Maryland; but in consequence of the fact that the domicile of her father, whose property was in ques- 36
tion, was in Massachusetts, and the further facts that the Trustees who held the property were residing in and were appointed in Massachusetts, and the real property held in trust was in Massachusetts, it was held that the law of Massachusetts must govern the question whether the will of Mrs. Wilmer was a good execution of the power conferred upon her by the will of her father. The Court further decided that her will was a sufficient execution of the power under the

law of Massachusetts, but clearly not under the law of Maryland, *under which latter law she had full testamentary power.*

In this case the testatrix, Mrs. Calhoun, who creates the power, Mrs. Clemson the donee of the power, and Thomas G. Clemson, the devisee and legatee of Mrs. Clemson's property, all resided in South Carolina. Beside this, the entire property, real or personal, or both, over which Mrs. Clemson had a power of appointment, which Appellee claims that she exercised, was, and is, in South Carolina, and wills of Mrs. Calhoun and Mrs. Clemson were admitted to probate only in South Carolina, *by the laws of which Mrs. Clemson had full testamentary power.* These facts seem to Appellant to demonstrate beyond a doubt that this question, to wit, whether the *corpus* of the property, in which Mrs. Clemson had a beneficial interest as *cestui que trust* for her sole and separate use during life, passed by the will of Mrs. Clemson as in due execution of the power under the will and codicil of Mrs. Floride Calhoun, must be determined by the law of South Carolina. It cannot be contended that the fact that Miss Lee, Complainant Appellant, is resident in the State of New York can affect the question by the law of what State the question at issue is to be determined. This rule has uniformly governed the Supreme Court of the United States: "that where any principle of law establishing a rule of property, particularly a rule of real property, has been settled in the State Courts, the same rule will be applied by the Supreme Court of the United States that would be established by the State tribunals. This is a principle so obviously just, and is so indispensably necessary under our system of government that it cannot be lost sight of; and it is not mate-

rial whether such construction has been established by 41
long usage or a judicial decision, even a single judicial decision."

Jackson v. *Chew*, 12 Wheat., 162.
Henderson and wife v. *Griffin*, 5 Pet., 154.
Carroll v. *Safford*, 3 How., 460.
Lane v. *Vick*, 3 How., 482.

II. The *second* inquiry is: What is the law of South Carolina determining that question?

The answer Appellant gives in the words of the 42
controlling case in South Carolina on that subject. In the Circuit decision in the case of *Bilderback* vs. *Boyce*, in the judgment of the Circuit Court, which was confirmed on appeal by the Supreme Court of the State of South Carolina, the following was laid down as the law of that State: 14 So. Ca., 535—"Powers in this State have been construed *strictly*, and appointments not within their meaning held invalid. Thus, a power in a will to sell such property as may be useless will not authorize an executor to sell any property, as he may 43
choose.—*McCants* vs. *Bee*, 1 *McC. Ch.*, 393. So a power to appoint by will is not executed by a mortgage to creditors with foreclosure and sale.—*Bentham* vs. *Smith*, *Cheves' Eq.*, 33. In the case of Withers *vs.* Yeadon a power was given by will of John Wagner to his son, George Wagner, to give property by his last will and testament to a child or children, or any of them. George Wagner, by his will, attempted to execute this power by giving all the property to his wife, 44
and also delegated his power of appointment to his wife and son, John Wagner. The Court held that no appointment was made, because the children being designated no appointment could be made to the wife, and that although the property was given to him in terms which would imply ownership, yet there being a power of appointment, and children answering the description of appointees, the appointment should have been made. The result was the Court held George Wagner made no appointment, and that all the chil-

dren of John Wagner were entitled to the slaves given and realty devised to George Wagner.—1 *Rich. Eq.*, 324."

The Supreme Court of South Carolina, in full bench and without dissent, not only confirmed the Circuit decree, but, further, went on to declare what was the law of South Carolina in these words: "Intention is a matter of fact, and must be reached through the will itself. In order to facilitate the inquiry as to the intention in such cases, the Court of Chancery in England, after much division and many efforts, at length settled certain rules to be followed. Without going into the learning involved, or attempting to review the numerous cases upon the subject, we content ourselves with a reference to those rules as stated in the case cited in the decree of *Doe d. Nowell* v. *Roake*, 9 *E. C. L.*, 497, which was carried by writ of error to the King's Bench, (12 *E. C. L.*, 363; 5 *B. & C.*, 720); and from the King's Bench to the House of Lords, where the judgment of the King's Bench was affirmed.—19 *E. C. L.*, 139. In that case it was solemnly decided that the Court would infer an intent to execute a power only in three cases: *First.* Where there was some reference in the will or other instrument to the power. *Second.* Or reference to the property which is the subject on which it is to be executed. *Third.* Or where the provision in the will would have no operation except as an execution of the power. According to this canon of interpretation, the power in this case was clearly not executed. The Merchants' Hotel is not mentioned in the will of Samuel J. Boyce, nor is the power referred to, and the terms are satisfied by the property which he left, without including that as to which the power existed. But it is strongly urged upon the Court that as the point involved is now for the first time to be decided in South Carolina, we are not complicated by previous decisions, and are at liberty to make a rule of our own—that the old rule of the English Chancery should not be followed by us, for the

reason that in its operation there, it was not entirely 49
satisfactory, resulting often in defeating instead of carrying out the intention. It is true that some eminent English Judges have expressed themselves to that effect, and for this or some other reason laws have been passed in England which declare 'that a general devise of real or personal estate in wills should operate as an execution of a power of appointment of the testator over the same, unless a contrary intent should appear in the will.'—7 Wm. IV; I Vict., C. 26, § 27." These
Statutes are certainly not of force as law in this State, 50
but the principles and practice of the old English Chancery, announced and followed by the great Masters of Equity, Somers, Hardwicke, Eldon and others, have been generally regarded with the greatest respect and as the highest authority, if not absolutely binding upon us. The Court of Chancery was originally established in South Carolina while a province of Great Britain, in 1721, and was "empowered to have and exercise the same jurisdiction in hearing, adjudging and determining all causes and suits in 51
equity in as full and ample a manner as any Chancellor, Court or Courts of Chancery in America can, may or ought to do." While the rigid enforcement of the rule of construction before referred to may have, in some instances, run counter to the actual intention, which sometimes happens in the application of other rules for the construction of wills, we do not appreciate the objection to the full extent urged. Upon such a subject it is necessary to have rules, otherwise we 52
should be absolutely at sea. *The execution of a power is not an ordinary matter, but is out of the usual course of things. It is incumbent upon the donee of the power to do the act; if not done, certain consequences of importance follow; and it would seem to be in accordance with the analogies of the law that those who claim under the appointment should be held to show satisfactorily that it was made.* In a large majority of cases testators dispose only of their estate.

53 *These wills, which embrace also the execution of powers, are exceptions to the rule. When, therefore, a testator having property leaves a will, disposing of it in the usual manner, without any reference to a power, the inference, in the absence of other proof, is, that the will is not one of the exceptions, but, as it purports, disposes only of the estate proper of the testator. If the will were intended to refer to and accomplish a matter so remarkable as the execution of a power, the part intended to make the appointment would naturally be separate and*
54 *distinct from the other parts.* "Every instrument executing a power should mention the estate or interest disposed of; and it is best to declare it to be made in exercise of the power, and the formalities required in the execution of the power must appear on the face of the instrument."—4 Kent, 329.

In most of the States of the Union which have no legislative enactments on the subject, there has been, as we understand it, a general acceptance, with some
55 modifications of the rule followed in the English Chancery. These modifications for the most part are upon the point of allowing proof of the circumstances under which the will was executed, so as to allow it to be read in the light of those circumstances. The cases are not in accord, and we will not encumber this opinion by referring to them. If there can be said to be a distinct American doctrine upon the subject, we do not know that it is anywhere better stated than by Judge Story in *Blagge* vs. *Miles*, 1 Story, 426. In that case
56 the rule of construction before referred to was stated, and the Judge in commenting says:

"The authorities on this subject may not all be easily reconcilable with each other, but the principle furnished by them, however occasionally misapplied, is never departed from: that if the donee of the power intends to execute the power, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. *I agree that the intention to execute the power must be*

apparent and clear, so that the transaction is not fairly 57
susceptible of any other interpretation. If it is doubtful under all the circumstances, then that doubt will prevent it from being deemed an execution of the power."

We are content to take this as the result of all the American authorities, which declares that the intention to execute must be *apparent and clear, so that the transaction is not fairly susceptible of any other interpretation.* Taking this as our guide, did Samuel J. Boyce intend, by his will, to execute the power in reference to the Merchants' Hotel? *His will makes no reference* 58
to the power or the property; it contains no expressions such as are usually employed in executing powers, but only the words of ordinary disposition, providing first for the payment of debts, &c. The testator had property of his own which fully satisfied the terms of the will, which, from anything that appears on its face, might have been prepared by one who had no knowledge of the power or the existence of the hotel. Before deciding the question whether the property as to 59
which the power existed, passed under the will of Samuel J. Boyce as part of his own estate, it is proper to inquire what the power of appointment was—whether it was part of his "estate" in such sense as, under that description alone, it would pass under the will. Samuel J. Boyce never had any *estate* in the Merchants' Hotel. It belonged to his father, who gave it to Trustees "to permit his son, Samuel J., to take the income for his own use *during his natural life*, with power of appointment, and in failure of such appointment, to his children." 60
The remaindermen *in esse* under the will of Ker Boyce took a vested interest, subject to be divested by the execution of the power.—*Williman* vs. *Holmes*, 4 *Rich. Eq.*, 476. The power could be executed only by *will*, which took effect at the death of Samuel J., when his interest even in the income ended; so that at the time the will took effect the testator had no property interest whatever in the hotel. We do not agree that the distinction taken between *property* and power is a

61 distinction entirely without a difference. This case affords a good example of a naked power as distinguished from property. "The distinction, although nice, is completely established between a gift to one indefinitely with a general power of appointment superadded and a gift to one for *life* with like power of appointment. In the former case the estate passes absolutely to the donee, and in the latter case an estate only for life to the donee with the power of appointing the inheritance or succession, which must be exercised
62 to be effectual."—*Scott* vs. *Burt*, 9 Rich. Eq., 360; *Aaron* vs. *Beck*, *Id.*, 412; *Wilson* vs. *Caines*, *Id.*, 421; *Pulliam* vs. *Byrd*, 2 Strob. Eq., 141; *Bradly* vs. *Westcott*, 13 Ves., 445. In the case before us, not only was the gift to Trustees definite, being *for life*, but the power of appointment was limited *to will.* The donee could not appoint to his own use.

The words in the residuary clause are very comprehensive, "whatever and wherever;" but they do not reach to the hotel, for the reason that they refer in
63 terms to the testator's "estate." The expression "all the rest and residue of my estate, of every nature and kind," in *Blagge* vs. *Miles*, was said to be incapable of passing property over which testator had only a power. "*These words mean that the testator does not intend to die intestate as to any part of his estate, and* they generally mean nothing more."—*Lupton* vs. *Lupton*, 2 John's Ch., 623.

Blagge vs. *Miles*, to which this case of *Bilderback* vs.
64 *Boyce* refers, says, 1 Story's Reports, 442:

"The property which the appointor has the right to dispose of is in no just sense vested in the appointor. It is not an interest in, right of, or title to, the property, but a mere authority given to the donee of the power, to be exercised over the property in a manner and to an extent which he does not otherwise possess. And such has been the uniform construction from the earliest periods of the law on this subject. The present power is a power in *gross;* that is to say, the estates to

be raised by it do not fall within the compass of the 65
estate for life devised. A power to dispose of an estate by an appointment among third persons in fee may be given to a mere stranger."

This case, *Blagge* vs. *Miles*, also says, at Story's Report, page 446:

"*That the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation.* If it be doubtful under all the circumstances, then that doubt will prevent it from being deemed an execution of the 66
power."

III. The *third* inquiry is this: Does the will of Mrs. Clemson, *under the South Carolina law*, execute the power of appointment conferred upon her by the will of Mrs. Floride Calhoun?

The Complainant, Appellant, says it does not, for these reasons:

a. The preamble of Mrs. Clemson's will distinctly 67
schedules her property which she thinks she has full testamentary power to dispose of, and that schedule distinctly and pointedly refers only to her own property which she has full testamentary power to dispose of, and in no manner and by no possible construction can be held to refer to any other property than that which she had full testamentary power to dispose of, and to no other power than her full testamentary power recently conferred upon her as on all other married women by the Legislature of South Carolina. To hold 68
otherwise would necessarily involve a stultification in terms of the words used by Mrs. Clemson, both as to her property and power and the idea necessarily conveyed by the words used.

b. In addition to the fact that there is no reference to the power conferred by the will of Mrs Calhoun to dispose of the *corpus* of the property, in which she had only a beneficial interest as *cestui que trust* for her life for her sole and separate use, there is an evident

69 enumeration by her will of the property on which her will is by her intended to act, and an evident exclusion of the property on which her will, if she was so disposed, and had carried that disposition out, could act by execution of power of appointment, for she says: Whereas I am entitled to certain distributive shares in the estate of her dead brother and sister, and to certain legacies under the will of her mother, and alludes to her full testamentary power to dispose of the same, and afterwards disposes of the same as her own property,
70 it strikes the Appellant as absurd that under these words she intended to dispose of property which was not hers, but over which she had at most a power of appointment.

c. All the words of her will are fully satisfied by the natural operation of her will on the property she disposed of; and it would be an exceedingly far-fetched, and in fact an impossible, construction to give operation to her will as carrying out her power of appointment;
71 for the legacies which she took under the will of her mother plainly referred to her beneficial interest for life in the bond and mortgage debt aforesaid, of which at the time of the execution of her will she had never got a cent., and which she might fairly refer to as property to which she was entitled, and which she might hereafter acquire. All the terms of the will can be fairly satisfied under the South Carolina law and have full scope and action thereunder, both in reference to her power to make a will, to wit, the full
72 testamentary power given her by the Legislature of South Carolina, and in reference to the property on which her will acted, to wit, her own absolute property, whether in possession or in expectancy, without invoking the law of any other forum, either as to what power was given Mrs. Clemson by the power of appointment conferred in the will of her mother or as to the exercise of that power: all law except the law of South Carolina on the real matter involved having been previously shown to be inadmissible in this discussion.

d. The will of Mrs. Clemson shows on its face, and 73
by anything like a fair interpretation of its terms, that she intended only to dispose of her own property. When she said, in the commencement of her will, "I am entitled to certain property," she meant property to which she was entitled, but of which she had not then got a cent, to wit: her distributive shares in the estates of her dead brother and sister and the *usufruct* of a fund under the will of her mother, which she might or might not get; her personal shares absolute in fee in these matters she gave to her husband. 74

To enlarge the property conveyed by Mrs. Clemson's will by adding thereto property over which she had only a power of disposition, is a torture of construction which fair logic will nowhere admit, and which the South Carolina law that governs this case most pointedly refuses to adopt.

e. All argument drawn from the words "notwithstanding my coverture, have full testamentary power to dispose of the same," has directly a contrary effect 75
to that apparently imputed to that language in the Circuit decree; the words full testamentary power notwithstanding my coverture, to dispose of her own enumerated property, mean, independent of the testimony, and by the testimony, exactly what they say: that Mrs. Clemson intended, as she had been invested by the laws of the State with the power to dispose of her own property, to dispose of the same, and no more. Mr. Burt, who drew the will, was the protegee of her father and her lifelong friend, and exactly carried out her 76
instructions. It is no case, like some of those cited by the Chief Justice, of a party where there is an undivided interest in an estate, or where the party making the will is *inops concilii*, but it is a case where a highly intellectual woman, thoroughly cognizant of all her rights, makes her will, drawn by the ancestral friend of her family, perhaps the most astute counsel in South Carolina, asks that her will be simply interpreted by the laws of South Carolina, and that her own blood, as she

77 expressed it to E. B. Calhoun and wife, as shown in their testimony, be not disinherited as to her property.

To hold that the will of Mrs. Clemson either intends to dispose of, or does dispose of, the *corpus* of property in which she had a beneficial interest for life for her sole and separate use, and over which *corpus* she had at most a power of appointment, seems to Appellant to transfer to a plain, unambiguous will the construction often put upon diplomatic correspondence, to wit: That it is "the language of studied ambiguity and
78 disingenuous antithesis," and to justify the *bon mot* ascribed to Talleyrand: "That language was invented to conceal thought."

IV. Concluding what has been said before with the observation, patent and necessarily flowing therefrom, to wit: that in Mrs. Clemson's will there is no exercise of the power of appointment conferred upon her by her mother unless there be two things apparent in her will:

79 1. An intent that the power of disherison as to her daughter Floride and her issue in the *corpus* of the property in remainder be exercised in Mrs. Clemson's will.

2. That said intent has been actually executed.

Neither of which, Appellant contends, has been done. It is, perhaps, proper, at the conclusion of this argument, to advert to certain other matters which Appellant regards as not properly for discussion before this
80 tribunal; for the only appeal being by Complainant, and there being no appeal by Defendant, "the rule is settled in the Supreme Court, U. S., that a party not appealing (here the Defendant, Appellee,) cannot take advantage of any error in the decree committed against himself."

"And if Appellee desires to avail himself of error in the decree he should bring a cross appeal. By omitting to do so, he admits the correctness of the decree as to the matters from which he does not appeal, and the

case stands before the appellate tribunal, the Supreme Court, U. S., the same as if the error complained of by Appellee had been waived at the hearing." 81

Chittenden vs *Brewster*, 2 Wallace, 196.

But independent of this—independent of the decision of the District Court, (*Lee* vs. *Simpson*, 37 Fed. Rep., 12,) and the decision of the Circuit Court herein, (transcript of record, page 51, folio 112,) the jurisdiction of the Circuit Court on its Equity side is abundantly maintained by the jurisdiction.

As to cloud on title: 72

3 Pom. Eq. Jur., §1395, and note.
Bunch vs. *Gallagher*, 5 Blatchford, 481.
Plant vs *Barkley*, 56 Ala., 561.

And by the infancy of complainant:

Bloomfield vs. *Eyre*, 8 Bevan, 250–59.
Dormer vs. *Fortesque*, 2 Atk., 282.
3 Atk., 129–34.
Bennett vs. *Whitehead*, 2 P. Wms., 645.
Morgan vs. *Morgan*, 1 Atk., 489. 83
Roberdean vs. *Ross*, 1 Atk., 544.
Curtis vs. *Curtis*, 2 Bro. C. C., 630–34.
Do. dem. Barrett vs. *Keen*, 7 D. & E., 386.
2 Spence Eq. Jur., 194–95.
Mansel vs. *Mansel*, 2 P. Wms., 681–82.
Harvin vs. *Riggs*, Richardson's Equity Cases, 291. [This is a volume of the South Carolina Equity Reports.]

And as to injunction to prevent the Defendant from conveying the property to the State of South Carolina, and as to non-suability of the State, see Art. XI of Amends. Const. of U. S. 84

In re. Ayres, 123 U. S., 443.
Cuningham vs. *Railroad*, 109 U. S., 446.
Lee vs. *Simpson*, 37 Federal Reporter, 12, and post.

85 That the suit was properly brought by Complainant, see

Addison vs. *Addison*, 9 Rich. Eq., 58.
Williman vs. *Holmes*, 4 Rich., Eq., 475.
Mazyck vs. *Vanderhost*, 1 Baily Eq., 48.

V. The real and only question for this tribunal is: whether Mrs. Clemson's will is a sufficient execution of the power of appointment conferred on her by the will of her mother, Mrs. Floride Calhoun.

86 LEROY F. YOUMANS,
For Appellant.



Charles A. Calvo, Jr., Printer, Columbia, S. C

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UNITED STATES OF AMERICA.

IN SUPREME COURT.

OCTOBER TERM, 1889.

DISTRICT OF SOUTH CAROLINA,
FOURTH CIRCUIT.

ISABELLA LEE, by her next friend, Gideon Lee,
Complainant—APPELLANT,

vs.

RICHARD W. SIMPSON,—RESPONDENT.

ARGUMENT OF J. P. CAREY FOR APPELLANT.

PICKENS C. H., S. C.
PICKENS SENTINEL BOOK AND JOB PRINT.
1889.

UNITED STATES OF AMERICA.

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ISABELLA LEE, by her next friend, Gideon Lee,
Complainant—APPELLANT,

vs.

RICHARD W. SIMPSON,—RESPONDENT.

On the 25th day of July 1866 Floride Calhoun departed this life leaving of force her last will and testament and codicil thereto. The 2d clause of the codicil is in these words:

2. By the nineteenth clause of the will, I directed the said bond debt on my deceased son Andrew, secured by mortgage on Fort Hill, together with all other property possessed by me, and not before disposed of, to be collected by my executors, and the proceeds to be divided into four parts—one part I gave to Anna: one part to her daughter Floride, and the two other parts to Kate and her children, as will appear by clauses 20, 21, 22, and 23 of the will. I desire now to change the disposition of the said bond and mortgage debt, and do now give and bequeath it in the following manner: Three-fourths of my interest in said bond and mortgage debt, amounting to about forty thousand two hundred

dollars, I hereby give and bequeath to my daughter Anna M. Clemson, to be enjoyed by her under clause
2 twenty of the will, and according to the provisions of that clause to vest in the same trustee, and to be subject to all the powers, trusts conditions and limitations of that clause precisely as the bequest therein made were subject to them, with this exception and alteration, that my daughter Anna is hereby authorized and empowered by her last will and testament, duly executed by her, to dispose of this bequest of three-fourths of said bond and mortgage debt as she pleases. If she does not thus dispose of it at her death, I give and bequeath it, the said three-fourths, to her daughter Floride, and
3 should the said Floride die without leaving issue, I give and bequeath it at her death to her brother Calhoun Clemson; but, nevertheless, Floride shall likewise have power to dispose of it at her death as she pleases, by a last will and testament duly executed by her.

The limitations of clause 20 of the will are as follows:

20. One part, being the fourth of the above residue, I give and bequeath to my daughter Anna during her life, and for her sole and separate use, and at her death I will and bequeath it it to her daughter Floride,
4 and at Florid's death, if she die without issue, I will and bequeath it to the children of my deceased sons, John and William, then living, equally among them, or to their issue, if they be dead, issue to represent parents.

On the 12th day of September 1875 Anna C. Clemson departed this life leaving of force her last will and testament in these words:

In the name of God: Amen! Whereas I am enti-
5 tled to legacies under the last will of my deceased mother, Floride Calhoun, and to a distributive share in

the several estates of my deceased sister, Cornelia Calhoun, and my brother, Patrick Calhoun, and notwithstanding my coverture, have full testamentary power to dispose of the same:

"Vow I, Anna Calhoun Clemson, the wife of 6
Thomas G. Clemson, of the town of Pendleton, in the couuty of Anderson, and State aforesaid, being of sound and disposing mind, memory and understanding, do make this my last will and testament in manner following:

"I will, devise and bequeath the entire property and estate to which I am now in anywise entitled, and which I may hereafter acquire, of whatever the same may consist, to my beloved husband, Thomas G. Clemson, absolutely and in fee simple. But should my hus- 7
band, Thomas G. Clemson, depart this life leaving me his survivor, or should he survive me and then die intestate, in either event I will, devise and bequeath my entire property and estate, as well as that which I may hereafter acquire, of whatever the same may consist, to my granddaughter, Isabella Lee, the child of Gideon Lee, of the State of New York, absolutely and in fee simple. I hereby nominate and constitute Thomas G. Clemson executor of this my will."

8

ARGUMENT OF J. P. CAREY, FOR APPELLANT.

The sole question before this court on appeal is this: Does the will of Mrs. Clemson execute the power of appointment conferred upon her by the will of her mother?

All the authorities agree that this is a question of intention. And when I say INTENTION, I mean an IN- 9
TENT to execute the power of appointment, CARRIED OUT.

It is a general rule that the donee of the power must clearly show that he means to execute it, for if he leaves it doubtful, or uncertain whether the act be done in execution of the power or not, it will not be construed to be an execution thereof. Sir Edward Sugden in his
10 work on Powers, Vol. 1, chap. 8, sec. 15, says: "When it can be inferred that the power was not meant to be exercised, the court cannot consider it executed." Chancellor Kent, vol. 4, page 335, expresses the rule thus: "The intent must be so clear that no other reasonable intent can be imputed to the will; and if the will does not refer to the power, or the subject of it, and if the words of the will may be satisfied without supposing an intention to execute the power, then, unless the intent to execute the power be clearly expressed, it is no execution." Lord Chief Justice Best in a case be-
11 fore him said that the intention to execute "must be so clearly demonstrated, that it would be impossible for a court to impute any other intention to the donee." Judge Story forcibly states the resultant American doctrine in Blagg vs. Miles, I Story, 426, where he declares that "the intention to execute must be apparent and clear, so that that the transaction is not fairly susceptible of any other interpretation."

In the case of Bilderback vs. Boyce 14 S. C. 528, the court accepts the doctrine as announced by Judge
12 Story and in the opinion says: "The execution of a power is not an ordinary matter, but is out of the usual course of things. It is incumbent upon the donee of the power to do the act; if not done, certain consequences of importance follow; and it would seem to be in accordance with the analogies of the law, that those who claim under the appointment should be held to show satisfactorily that it was made." The burden of proof is thus seen to rest upon the party claiming under the appointment.

Three classes of cases have been held sufficient demonstrations of an intention to execute a power. 1. Where the instrument of execution would have no operation whatever, except as an execution of the power. 2. Where there has been reference to the power of appointment in the instrument of the execution. 3. Where there has been reference to the property, which is the subject on which it was to be executed. To these tests we may add another: 4. If any thing other than the three tests above named, is relied upon to show an intention to execute the power, it must make that intention APPARENT AND CLEAR, SO THAT THE TRANSACTION IS NOT FAIRLY SUSCEPTIBLE OF ANY OTHER INTERPRETATION; and show that this intention is EFFECTED in the instrument of execution. We proceed to the discussion of the subject, taking for our guide these four tests of intention.

1. Would the instrument of execution have no operation whatever except as an execution of the power? We contend that in this case no inquiry into the state of Mrs. Clemson's property is competent for several reasons. 1. Because the will of Mrs. Clemson is so worded that the ownership of either realty or personalty, or both, at any time before her death, would satisfy the terms of the ambulatory instrument. Says Mr. Sugden at chap. 6, sec. 7, par. 44: "A gift of all my personal estate will carry any personal estate which I may possess, and therefore it is not specific, and consequently, although I happen to have none, yet it will not apply specifically to the personal property within the power." In Jones vs. Curry, 1 Swans, 66, the court says: "The question is whether there is sufficient evidence on the face of the will of the intention to execute the power! The court cannot look beyond the will. Whatever may be the inadequacy of the testator's property to satisfy the terms of the will, and

whatever may be the conviction of the court as to the intention to execute, the state of his personalty at the time of the will or death cannot be examined for the purpose of collecting evidence of intention." In Jones vs. Tucker, 2 Mer. 535, the court says, "The will purports to pass the property of the testatrix in terms appropriate for that purpose—on this instrument the judgment of the court must be founded." In Webb vs. Honor, counsel representing the donee of the power admitted that the state of the testator's property
17 cannot be taken into consideration, when the bequest is in general terms, but claimed that where there is a gift of a particular species of property, personal, then it was to be taken into consideration.

In Standen vs. Standen, 2 Ves. jr. 589, it was held that evidence is received to show, that a donee of a power, who has devised real estate, without specific reference to his power, had no real estate which he could devise, except that which was the subject of the power; but as to personalty this could not be done.

18 See also Dean vs. Roake 5, Bam & Cress, 720; Bradley vs. Westcott 13, Ves. Jr., 445.

As the possession at any time of personalty alone would satisfy the terms of Mrs. Clemson's will which purports to dispose in general terms of her own estate, we think no inquiry can be had into her estate. She says she is willing her own, and should it turn out that
none she had ~~more~~, she could not be held to the disposition of the property of another, which she has excluded in words.

In the case of Wilkins vs. Allen, 59 U. S., 18
19 How, 385, it was sought to show the actual amount and condition of the personal estate of the testator at the time of the execution of his will, as well as at the period of his death, and that the same was entirely in-

sufficient at either of said periods to pay the specific and pecuniary legacies provided therein; for the purpose of explaining the meaning of the testator in using the word "surplus" in the residuary clause, by showihg that if the same did not embrace the real estate, the said clause would be entirely inoperative, for the reason that there was in point of fact, at neither of said periods any surplus whatever. The court held that "evi- 20
dence of the actual amount and condition of his personal estate, and that the same was insufficient to pay the legacies, was not admissible to explain the residuary clause, or the words 'surplus,' by showing that if the same did not embrace the real estate, such clause would be inoperative, because there would be no 'surplus.'"

But say the other side, the court can put itself in the place of the testator. It can, as is held in this case, only "to explain ambiguities arising out of extrinsic circumstances." Where there is no ambiguity, 21
there is no occasion for the court to put itself in the place of the testator.

In the case of Blake vs. Hwakins, 98 U. S., it appeared from the will itself that the testatrix had specially bequeathed all of her own property and then proceeded to give specific amounts amounting in all to $28,500, over which she had no power of appointment. There the testatrix had a power over so many dollars and proceed to give so much of it away as MONEY and not as her own estate, but Mrs. Clemson in general terms purports to give away her OWN ESTATE, thereby 22
excluding everything that was not her own.

2. Another reason why we think inquiry into Mrs. Clemson's estate on the part of the defendants to show she had none, is incompetent, is that any such attempt contradicts the will itself. Such proof would contradict the introductory clause, which asserts that she has an estate and of what it consists. It contradicts the

will proper, which asserts that she has propetty and disposes of it. No proof can be offered to contradict or vary a will. The will dicloses what she said and
23 thought she had. In Wilkins vs. Allen 59 U. S., 18 How, 385, the court expressly says that, "evidence cannot be heard to show a different intention in the testator trom that which the will discloses," and concludes the case by saying, "that if the evidence were to show all that is claimed for it, it could not be heard to effect this will."

We have thus made these objections to inquiry into the state of Mrs. Clemson's property for the purpose of showing that the judgment of the conrt should rest upon the will itself. But we have nothing to fear from
24 such inquiry, for the proof shows that she had abundant property to satisfy the words of the will in all its parts. By examination of folios 62 to 67 of the printed statement your Honors will see that the Referee gives a statement of how much was received by Mrs. Clemson as rents and profits of Fort Hill from the year 1866 to 1871. Her share of the rents and profits actually received is there stated to be $3,596.03. The referee stated that this amount passed into the hands of Mr. Clemson, the trustee of his wife. There can be no doubt that this sum of money passed under the will of
25 Mr. Clemson. We have traced it into his hands just before her death and no effort has been made to show that Mr. Clemson did not keep it. The testimony shows that Mr. Clemson cultivated this farm for the years 1872-73-74 and 75 and that the rents and profits during this period was worth $600 a year, making for the four years the sum of $2,400, which also passed under this will to Mr. Clemson. At the time of her death in September 1875 the crop which was then standing upon the plantation passed under her will. The amount of rents for these years is not questioned by
26 defendant, nor is there any attempt to show that Mr.

Clemson did not take them under the will of his wife. The share of each heir in the estate of Cornelia Calhoun was $601.94 (Folio 175.) . She therefore received as heir-at-law of her sister the sum of $601.94. She also received as heir of her brother Patrick, $120.49 (Folio 190.) She also bought at the sale of A. P. Calhoun in 1868 furniture, silver and other personalty to the amount of $505.91. This was her own separate property, the amount credited on the bond as so much cash. This furniture &c., passed under her will and a part, if not all of it, is enumerated in the appraise bill 27
of Mr. Clemson. The Georgia gold mine sold for $410 and her share in it was 1-5 of $370=$72. Mrs. Clemson received from the Boisseau trust fund from the year 1866 to her death in 1875 the sum of $250 to $300 a year. Taking the minimum $250, she received from this source the sum of $2500 and one-half of it after she made her will, (Folios 439-440 and all of page 107.) Her pictures we may safely value at $1,000. The following table shows what Mrs. Clemson actually received and owned and every cent of which no doubt passed to Mr. Clemson under her will: 28

Rents on Fort Hill for '66-67-68-69-70-71	$ 3,596.03
" " " 1872-73-74-75	2,400.00
From estate of her sister Cornelia	600.00
Interest in Georgia gold mine	72.00
" Patrick's estate	120.00
Purchases at sale of A. P. Calhoun	505.91
From Boisseau fund, '66 to '75	2,500.00
Value of pictures	1,000.00
	$10,795.88

The testimony shows that Mrs. Clemson did actually 29
receive and own the above account. Besides this, at the time she made her will she had large and reasonable expectancies. She had a life estate in the whole bond and mortgage debt.

A. P. Calhoun, at the close of the war, had a claim against the Unsted States Government for 170 bales of cotton. Proceedings were instituted, and were pending when Mrs. Clemson made her will, to recover the value of this cotton. Had it been recovered, it would have been applied to this debt and was sufficient to almost pay it off in full. That there was good reason to suppose this claim would be recovered is shown
30 by the fact that a small part of it was recovered and two of the Judges who tried the case thought the whole amount ought to be recovered. This recovery would also have considerably increased the estates of Patrick Calhoun and Cornelia Calhoun, the two estates expressly mentioned by Mrs. Clemson in her will. Had the claim of James Edward Calhoun against the Mexican Government been recovered the estate of Mrs. Clemson would have been increased by that. If under the laws of Maryland, Bladensburg property be considered Mrs. Clemson's, her estate is increased ten
31 thousand dollars. If it is not hers, there certainly was sufficient doubt about the title to have led her to contemplate this property in making her will. From the foregoing considerations it is evident that Mrs. Clemson did actually receive and have ample property to satisfy the terms of her will and that there was reasonable probability at the time she made her will that she would acquire still more. This no doubt is the reason she provides in the will for after acquired property. The testimony of the witnesses of the defendant as to what Mrs. Clemson owned cannot amount to but very
32 little. They all say they knew nothing about how the different estates of her relatives were settled up. The records of the courts and offices fix a large amount in her. Besides, the question put to the witnesses was in this form: "Was or was not Mrs. Clemson at the time of her death reputed to have any other property than that coming to her through her mother's will?" There

are two serious objections to such a question. 1. She could have owned ever so much property and there never have been any repute about it. This is trying to prove a negative by an affirmative which is not shown to exist. 33

2. The question itself excludes what she did take under her mother'swill, which we have shown to be about six thousand dollars. There was, therefore, no attempt to get around the rents and profits of Fort Hill from 1866 to 1875. The most any of the witnesses could or did say was that if Mrs. Clemson had any other property than that she took under her mother's will, they did not know it. We have shown that she had considerable property of which these witnesses did not know. We therefore conclude First, That under the first test of intention, there is nothing to show that 34 Mrs. Clemson intended to execute her power of appointment. She says she had property and what she then thought no doubt controlled her intentions. The very ground upon which this test rests is that a testator would not make a will knowing at the time that he had nothing for it to operate upon. But suppose he says he owns a piece of property and it turns out after his death that he does not, no argument can be drawn from this that he intended to execute a power over another piece of property. But in this case, Mrs. Clemson says she has property and proceeds to make a will, 35 on the assumption that she has, and we show as a matter of fact that she did. 2. If the defendant was over the difficulties: (a) that she says in her will she has property and proceeds to will her own estate, and (b) that she did actually have it, he could only frame an argument as to what her intention was; but upon what could he rely to show the second requisite to the execution of a power, A CARRIED OUT INTENT? Mr. Justice Strong says where a donee AVOWS his intention to execute a power and then proceeds to dispose of his own

estate, he fails to execute the power. For a much
36 stronger reason must this be true (as in the present case) where there is NO AVOWAL of intention and the testator disposes of his own estate only.

2. Does the will of Mrs. Clemson refer to her power of appointment over the property in which Mrs. Lee had a vested remainder?

What ought she have done in order to clearly manifest her intention to execute the power? I will let Mr. Sugden answer this question. In his work on Powers, Vol. I. Chap. VI. Sec. I. Paragraph 3, he says: "It will be collected from the precedent in a preceeding
37 page, 1st, that the deed executing the power should be expressed to be in exercise of it; secondly, of every other authority enabling the donee in that behalf; and thirdly, that it should be shown in the body of the deed that the formalities required to the execution of the power are complied with. Every well-drawn deed of appointment embraces these three points; the first clearly evinces the intention of the person executing the power, which is particularly necessary where he has an interest as well as a power; the second guards against any misrecital of the deed creating the power; and the third
38 affords internal evidence of the ceremonies having been complied with." A mere glance at the will of Mrs. Clemson will show that it contains neither of these three requisites of every well-drawn deed of appointment. She does not even say that she has a power of appointment, much less that she means to exercise it. Nor does she say that her mother or any one else has conferred an authority of any kind upon her. Nor does she show in the body of the will that she has complied with the formalities required to the execution of any power. We thus see that her will
39 contains neither of the three requisites of a well-drawn instrument of appointment, much less all. Had she

intended to execute a power, surely this would not be the case. Especially when her will was drawn by such a distinguished lawyer as Major Burt. He used the words which were necessay and proper to declare her intentions, and they are such as are not at all suited to express an intention to exercise a power. Would any lawyer, upon reading this will, dream of the existence of a power of appointment in Mrs. Clemson? We can only get at the thoughts of another, through the words he uses. The language used in this instrument by Mrs. Clemson neither discloses her limited power of 40
disposal, nor shows an intention to effect it.

The will may be divided into three sections:
1. The introductory clause which is in these words:

"Whereas, I am entitled to legacies under the last will of my deceased mother, Floride Calhoun, and to a distributive share in the several estates of my deceased sister, Cornelia Calhoun, and my brother Patrick Calhoun, and notwithstanding my coverture, have full testamentary power to dispose of the same."

2. The clause which asserts that "I, being of 41
sound and disposing mind, memory and understanding, do make this my last will and testament, in manner following:

3. The will proper, which is a general disposition of "the entire property and estate to which I am now in anywise entitled, and which I may hereafter acquire, of whatever the same may consist." It is too plain for argument that there is no reference to her power of appointment in either of the last two sections. Is there any in the introductory clause? This clause is 42
not a part of the will proper, but simply operates like the WHEREAS clause of a preamble or statute, and is important only as it may shed light upon subsequent dispositions. But what did Mrs. Clemson mean by

the words of this clause? Evidently that the title to the property therein mentioned was in her and that she, notwithstanding her coverture, had the power to make a will and dispose of her own property as she pleased. Or in other words, that the disabilities arising from coverture were removed, and she, though a married wo-
43 man, now had full testamentary capacity. Before 1868 a married woman in this State had no testamentary capacity. Her will was void by statute 3, Stat. 343-5.

The Constitution of 1868 removed her common law disabilities to the extent of allowing her to bequeath, devise and alienate HER SEPARATE ESTATE, the same as if she were unmarried. In 1870 enabling acts were passed carrying out the provisions of the Constitution on the subject. The will being made in 1871, how natural was it for Mrs. Clemson to refer to those recent changes in the law which conferred upon her a power, which had always before been denied
44 her. How much more natural that a lawyer in preparing a will at that time, for a married woman, should refer in it to the great change! Our own Court has held in several recent cases that what a married woman can do under the enabling acts is a question of POWER. The use of the words "notwithstanding my coverture," shows that this is the correct interpretation of the clause. Their use shows that coverture had heretofore been a bar to a married woman making a will, but that bar no longer existed. She says she has "FULL testamentary power." These words evidently
45 mean capacity to make a will. This is their primary and only signification.

His Honor, the Chief Justice agrees in his decree that there is REASON in this construction, yet he insists that "the more reasonable inference seems to be that she referred to the power of disposition given by her mother's testament, rather than to her legal capacity."

If we understand the authorities, the rule is that if our construction of the words is fair and reasonable, then the power must be held not executed, and therefore there can be no MORE REASONABLE INFERENCE. But it appears to me that there are four reasons why the inference drawn by the Chief Justice is not the more 46
reasonable. 1. She refers to the power over her legacies in the same connection and by the use of the same words she uses in referring to her interests in the estates of her brother and sister, her absolute property. 2. She uses the words testamentary power. The plain ordinary meaning of these words is the power to make a testament. 3. She uses the words FULL testamentary power. Why use the word FULL to describe a power to appoint? Full testamentary power must mean the same power to make a testament as if she was unmarried, or as much testamentary power as any one. 4. If in this introductory clause she was referring to her 47
power to appoint, why did she in the disposing part of her will use words so aptly descriptive of her OWN property, and not of property covered by a power?

She says she has, "notwithstanding her coverture, full testamentary power to dispose of the same." What does the word "same" here refer to? In general it refers to the property which she has in the same sentence aptly described as her own. And in particular, to three things: 1. Her share in her sister Cornelia's estate. 2. Her share in her brother Patrick's estate. 48
3. To the legacies she has the title to under her mother's will. Now she had no limited power of appointment over the property derived from the estates of her sister and brother. It was hers absolutely. The word power here is certainly used in the sense of that power over a thing which results from its ownership. In the same sentence and in the same connection she makes the word POWER refer to the legacies, the title to

which is in her under her mother's will. Therefore the conclusion is that the word POWER here refers to that which results from ownership, and not the extraordinary special power of appointment. She has thus made
49 the word "same" refer to the property for which she herself holds title. Her exact words are that "I am entitled to legacies under the will of my deceased mother." Now what legacies was she entitled to under this will? She was entitled to the oil portrait of her grand-mother therein given her. She had a life estate in the "furniture and everything in the house at Pendleton and upon the premises," given her in clause 2 of the will. She was entitled to a life estate in the bond and mortgage on Fort Hill. It was given her for "her sole and separate use," and therefore the in-
50 terest on the said debt as long as it remained in that form was her own property and the rents, income and profits of the Fort Hill plantation from its purchase to her death was her own separate estate. The amount of these we will take up under another head. We are thus inevitably led to the conclusion that the word POWER used in the introductory clause of this will means that power which existed in Mrs. Clemson over her own property which she has in unmistakable terms described as her own, and cannot refer to her limited power to will away the property of another. Every
51 word of this introductory clause and of the whole will is satisfied under this interpretation and by passing Mrs. Clemson's own property. The case of Cooke vs. Cauliffe 79 English Common Law Rep. 244, is in many respects very much like this one. There the testator used the words: "All my real estate over which I have any disposing power." Lord Campbell said: "There is here no direct reference to the power and I think no sufficient reference to the subject matter. The testator had at the time he used these words, estates of his own, estates coming from his own ances-

tors and on which he resided; part under settlement, 52
and part at his absolute disposal; and every word in his will is satisfied by supposing that he referred to those patrimonial estates over which he had complete disposing power, and not to the Pulestine estate over which he had a limited power of appointment." Here the words "any power of disposal" were held not to be a reference to a power of appointment, and these words are much stronger than the ones used in the will we are considering, to wit: "testamentary power."

But even if Mrs. Clemson had in this introductory clause expressly declared her intention to execute the power, I submit that her will would fail to do it, 53
because when she comes to her will proper, she disposes of her own estate only. In the clause where she states that she is of sound mind &c., she expressly says I "do make this my last will and testament, in manner following;" not what has gone before, but here, the following, is my will. She then disposes of the estate which she then owns or may afterwards acquire in terms which throughout apply to her own property and no other. In Blake vs. Hawkins 98 U. S. 315, Mr. Justice Strong in delivering the opinion of the Court says: "It must be admitted that the avowal by the testatrix in 54
the introductory clause of her will of her purpose thereby to execute the power was not itself an execution. It is important only as it may shed light upon the subsequent dispositions. A previously expressed intention may serve to explain language afterwards used, and show what its meaning is; but it is one thing to intend a future act, and quite another to carry out that intention. While it is true that whether a power has been executed or not is a question involving a consideration of the intent of the donee of the power, it is equally true the intention must be found in the acts or dispositions of the donee, and not alone in any previously expressed purpose. After referring to the three 55

things which have been held indicative of an intention to execute a power and mentioning the first, where there was reference in the instrument to the power, he says: "The first of these indications, however, must be understood as a reference to the power IN THE DISPOSITIONS ACTUALLY MADE. In Lawson vs. Lawson, 3 Bro, Ch., 272, a will expressed to have been made in pursuance of a power which the testator had, was held by the Lord Chancellor not to have been an execution thereof, because the subsequent dispositious were ap-
56 parently applicable only to his own estate. It may be remarked that Sir Edward Sugden expresses doubts of the correctness of this decision, for the reasons given by Lord Thurlow; but he still lays down the rule, that "Although a will be expressed to be made in pursuance of the power, yet if the testator appears to dispose of his own property only, the power will not be executed by the will," (See I Sug. on Powers. Chap. 6, Sec. VII, Par. 17.) The learned Justice further says: "After all, an appointment under a power is an intent to appoint carried out, and if made by will, the intent and its exe-
57 cution are to be sought for through the whole instrument." The court in this case held the power executed upon the ground of the specific "gifts and directions" contained in the disposing part of the will. The testatrix gave all her own property away in specific legacies and then proceeded to give other legacies. These legacies could not have been paid, nor that part of the will which gave them satisfied, unless the property embraced in the power was made to respond to them. In Warren vs. Conn. Life Ins. Co., 109 U. S. 962, Justice Matthews says: "The rule as adopted by this Court
58 was tersely stated by Mr. Justice Strong in Blake vs. Hawkins in this form: "If the will contains no expressed intent to exert the power, yet if it may reasonably be gathered from the gifts and directions made that their purpose and object were to execute it, the will must

be regarded as an execution. After all, an appointment under a power is an intent to appoint carried out, and if made by will the intent and its execution are to be sought for through the whole instrument." Apply this terse rule to the will of Mrs. Clemson. There is certainly no expressed intention to execute the power. Nor can it be gathered from any gifts and directions made in it, there are no gifts or directions in it, except that she in general terms, gives all she has 59
or may afterwards acquire, be it much or little, to her husband. We therefore conclude that neither an intention to execute her power of appointment appears in her will, nor does the disposing part thereof carry out any such intention.

3. We shall next inquire: Does the will of Mrs. Clemson refer to the property over which her power of appointment extended? It is perfectly clear that the disposing part of the will does not refer to or attempt to carry anything but her own property. Is there reference in the introductory clause to the subject of her 60
power? She asserts in this clause, "I am entitled to a share in my sister's estate. I am entitled to a share in my brother's estate. I am entitled to legacies under the will of my mother. She refers to the property which is hers as heir at law of her sister and brother in the same sentence, and by the use of the same words as she refers to what she takes under her mother's will. If, in the two first instances, she is refering to her own property, BY NECESSITY, she is referring to the same in the third instance. Her words and the connection in which she used them will not bear 61
any other construction. In all three of the cases she is setting out her own title, and in neither does she mention property of another over which she had an authority. If, then she took the title to any property under the will of her mother, every word of this introductory clause is satisfied without including the property of

Mrs. Lee, which Mrs. Clemson's own words has ex-
excluded from it. What did she take under the will?
1. An oil portrait of her grandmother, no doubt valued
and prized very highly by her. 2. A life interest in
the furniture and property upon the Pendleton prem-
ises. 3. A life estate in a bond and mortgage debt
62 amounting to forty-two thousand and two hundred dol-
lars and the rents, incomes and profits of the
realty which was purchased with this debt from the
time of its purchase in 1866 to 1875, till her death.
What is a life estate but a title, and by her words that
is what she describes. She was entitled to the interest
on this bond and mortgage debt from the death of her
mother in July, 1866, till her death, and as Fort Hill
was purchased with a part of it, she was entitled to the
rents, income and profits of that valuable plantation
for the years 1866 to 1875. We thus see that she was
entitled to large legacies in her own right under the
63 will of her mother. The exact amounts produced by
the life estate, we have already seen to be on Fort Hill
for nine years, not less than six thousand dollars
and the interest on the debt as long as it was in the
form of the bond and mortgage, which was five years,
1866 to 1871, on the whole sum, and from that time
on the judgment over against A. P. Calhoun's estate.
At the very time of her death she had a valuable crop
on the fort Hill plantation, which was her own under
her mother's will. She has used words in the dispos-
ing part of her will which confirm the construction we
64 are placing upon the introductory clause. She there
disposes of what she may afterward acquire. Now the
life estate in this property was the very thing which
made her know that she would acquire future property.
It was bound to produce it. At the time she made her
will, Fort Hill had been ordered to be sold in the fol-
lowing January, and she no doubt knew it would be
purchased under that bond and mortgage debt, and

that the income from it would be valuable. It was so purchased and the income was no doubt valuable. That such thoughts as these were in her mind when this will was signed I think is clear, and that the words used therein are the legitimate offspring of such thoughts I 65
think equally clear. By dealing with her own estate in such clear terms, has she not manifested an intention to deal with no other? By mentioning the property to which she herself had the title, has she not by that very act excluded that over which she had the power to call it back out of another and divert into another channel. Where a person has the power to dispose of two things, and in his will, which is the last act he can perform, because it is not an act of disposition till he is dead, he mentions one and not the other, does he not thereby conclusively show his intention not to dispose of the other? This is exactly what Mrs. Clemson has done. She could dispose of her own property, by 66
virtue of her ownership. She could dispose of the vested remainder in Mrs. Lee by virtue of a special limited power conferred upon her. If one's own is that for which he has the title, she mentions her own and disposes of her own. She does not mention the other or attempt to dispose of it. How then can it be said that she intended to execute her power over this property, or that she did execute it?

His Honor, the Chief Justice, finds a reason for holding the power executed from the fact that Mrs. Clemson substituted her husband as trustee. He says
the will is dated September 29th, 1871, and upon the 67
13th of December following Mrs. Clemson exercised the power of appointing a new trustee, the instrument reciting that by the will and codicil of her mother, Mrs. Floride Calhoun, she is entitled to considerable legacies, the legal title of which is, by the will, vested in Edward Noble, Esq., of Abbeville County, in said state, as trustee and proceeded to appoint Thomas G. Clem-

son "as trustee under the will for the property therein bequeathed to me, and also for the property bequeath-
68 ed me in the codicil, in the place of said Noble. Clearly, the "legacies" to which Mrs, Clemson, by the instrument of apointment, stated she was entitled, and of which she appointed her husband trustee, were the same legacies to which, by the will, she declared herself entitled, and which she thereby devised and bequeathed to him." It seems to us that the conclusion to be drawn from this instrument in connection with the will is against the execution of the power. 1. In both the reference is to the legacies" I AM ENTITLED TO. We have shown what these legacies were and their amount. It was a considerable amount of property which she took
69 the title to under the will and not embraced under the power of appointment. How can the words I AM ENTITLED TO refer to property the title to which was in another. The cases of Bilderback vs. Boyce 14 S. C. 528, and Williman vs. Holmes 4 Rich. Eq. 475, settle that under the will of Floride Calhoun, Mrs. Clemson took a life estate in the property in dispute, with the power to appoint the FEE and this complainant's mother took a vested interest therein subject to be divested by the execution of the power. The fee being vested in the remainderman, it could in no just sense be said that
70 Mrs. Clemson referred to it by the use of the words "legacies I am entitled to." 2. It is clear that under this appointment Thomas G. Clemson was trustee of the same property that Edward Noble was trustee of. Noble was trustee for Anna only and not for the remainderman. He was trustee for the property expressly given her which was a life estate. As he was not a trustee for the remainderman, or of the FEE in the property, neither was Mr. Clemson, who took his place. Hence when Mrs. Clemson referred to legacies she was entitled to she was referring to her own property and not to that covered by the power, which was really
71 vested in another.

We have thus examined this introductory clause in the light of reason and principle. Let us now look at it in the light of authority. In Ellison vs. Ellison 6 Ves. Jr. 663, the Vice Chancellor said: "It is necessary to describe the subject in such a way, that there can be no doubt he meant to embrace that property." Says Mr. Sugden in Vol. I, Sec. 7, Par. 32: "Slight circumstances of conformity or reference will not amount to a sufficient indication of the intention; where the power is given to the husband after the death of his wife, and he makes a general disposition, to take effect after his 72
wife's death, that will not of itself be deemed evidence of his intention to execute the power (Andrews vs. Emmot 2 Bro. Ch. 297) (Bennett vs. Aburrow 8 Ves. Jr. 609.) The instrument being executed in the manner required by the power goes for nothing." (Andrews vs. Emmott.) In Langham vs. Nenry 3 Ves. Jr. 467, Lord Alvanley stated that in his opinion the "testator did not mean to include property over which he had a power under the words MY ESTATE." In the case of Doe vs. Byrd II East. 49, where a man was tenant for life of an estate, with a power of appointment to 73
the children for such estates as he should think fit, and he had an estate of his own, by his will he gave to each of his daughters £200, and then devised all the rest, residue and remainder of his lands and personal estate to his son, the Court held that the power was not well executed. Mr. Sugden at Vol. I, Chap. 6, Sec. VII, Par. 50, says: "A general gift of moneys, securities for money, and other personal chattels, which are in their nature subject to constant change and fluctuation—as to them the will must refer to them as the subjects of the power or they will not pass." Here 74
is our case exactly. The property over which Mrs. Clemson's power extended was a bond and mortgage and in order to pass it she must specifically refer to it. She certainly fails to do it.

In Webb vs. Honor, 1 Jac. & Walk. 352, a will directed certain property to be invested in the public funds for one for life, and then as he should appoint by will, and in default of appointment, to his children. The investment was made in three per cent. consuls, and the donee gave by his will the whole of his personal estate, consisting of money invested in any of
75 the public funds, furniture, money, watches, trade and all the property he might die in the possession of or entitled to, to his wife. The gift was held not to be sufficiently specific to pass the money invested in the public funds, which was subject to the power.

In Michael vs. Michael, 18 Maryland, where a donee had a power to dispose of the sum of $4,250, and made a will giving some legacies of $100 each, and then gave "all the rest and residue of her estate, real, personal and mixed," to her daughter, the Court held as the will did not refer to the power nor to the
76 sum of money which was the subject of it, there was no execution of the power. These authorities show that the reference to the property which is subject to a power must be clear and undoubted, and where it is in the form of a bond and mortgage, SPECIFIC. We, therefore, reach the same conclusion by the aid of authority that we did with the aid of reason; that even in the introductory clause of her will, Mrs. Clemson does not refer to the property over which her power of appointment rode.

77 But even if she had in the introductory clause clearly referred to the property embraced under her power, it would not pass under her will, for in the disposing part thereof, she does not attempt to convey anything but her own property. She thus entirely leaves out the second requisite to the execution of a power laid down in Mr. Justice Strong's TERSE RULE, "the intent carried out." Her will is a general dispositon of her

own property, which never executes a power as to specific property. What she then had or might afterwards acquire is all that could possibly pass under it. In the case of Webb vs. Honor the testator used words very much like those in Mrs. Clemson's will. 78
He gave "All and singular the whole of every such property as I may be in possession of, or IN ANYWISE ENTITLED TO, at the time of my decease." The Master of the Rolls said: "There is nothing in this instrument to show that the testator meant to dispose of anything but his own property, every part of it is satisfied by giving all he was possessed of." "He speaks of his personal estate, and every word he has used tied it up to the property that then belonged to himself, or that he might before his death become entitled to. It would therefore be impossible by any evidence to show an in- 79
tention in this will to pass property not belonging to himself, but over which he had a power." In Jones vs. Curry, I Swaust. 66, the testatrix had an estate for life in certain real and personal estate, with power of appointment by will. By her will she gave "all my estate and effects of whatever denomination." It was held that the power was not executed. Sir Thomas Plumer said: "This will contained no words which would be without operation, unless referred to the power. On the contrary the testatrix uses terms of generality, "all my estate and effects of whatever de- 80
nomination." That clause would embrace all her real and personal property; but would it go beyond that? Could it extend to what was not the property of the testatrix? The words are not of a specific description of any estate or of any species of interest, but adapted to comprehend everything which and to exclude everything which was not a part of her property. In order to apply them to property not her own, we must reject the pronoun MY. The distinction being now established between property and power, these words containing

81 no direct reference to any particular fund, nothing in description to enable the Court to collect her intention to exercise her power, are not sufficient to designate with due certainty property not her own, but of which she was empowered to dispose. Though she had no real estate, she might have personal property of various descriptions, and the terms would be satisfied by passing that."

In Lovell vs. Knight 3 Sim. 275, a married woman had a power to appoint certain lease-hold
82 estates. By her will she gave "the whole of her property both real and personal and whatsoever she might possess at the time of her decease." The Vice Chancellor said: "Was this testamentary instrument to be taken as anything else than a general will by the testatrix, meaning to dispose of all her property in general terms? Here there was no specific enumeration of the articles of property intended to be disposed of. He did not think that if this person had intended to dispose of all her property, more comprehensive and general terms could have been selected than are here
83 used; and it is perfectly settled, that wherever a will expresses an intention to pass the general property which may belong to the party making the will, such a will shall not be deemed an execution of a power with regard to any specific property." In Blagge vs. Miles, the words "all the rest and residue of my estate, of every nature and kind," was said to be incapable of passing property over which testator had only a power. "These words mean that the testator does not intend to die intestate as to his estate, and they generally mean nothing more." Lupton vs. Lupton, 2 Johns. Ch. 623. In Bilderback vs. Boyce, 14 S. C. 528, a
84 hotel was given to trustees to permit Samuel J. Boyce to take the income during his natural life, with a power of appointment by will. He made his will and gave "all the rest and residue of my estate wherever and what-

ever." The Court said: "The power could only be executed by will, which took effect at the death of Samuel J. when his interest even in the income ended; so that at the time the will took effect the testator had no property interest whatever in the hotel." The Court further says: "The words in the residuary clause are very comprehensive, 'whatever and wherever,' but they do not reach to the hotel, for the reason that they refer, in terms to the testator's estate." Mrs. Clemson 85
doubly shows that she is disposing of her own estate. The gift to her husband is of whatever she then has or may afterwards acquire, and in the very next sentence she says if she survives her husband or he dies intestate "I will devise and bequeath my entire property and estate, as as well as that which I may hereafter acquire, of whatever the same may consist, to my grand-daughter, Isabella Lee." It is clear that she intended to give her grand-daughter, in case she outlived her husband, the same property she had just given him. In both instances she is clearly dealing with her own property, In the one case she describes it as that which I AM ENTITLED 86
TO, and in the other as MY ESTATE. How can there be any question about either what she intended or what she did?

When His Honor, the Chief Justice, in his decree comes to the words of gift in the will, "I will, devise and bequeath the entire property and estate to which I am now in any wise entitled, and which I may hereafter acquire, of whatever the same may consist," he says that it would be too narrow and technical to so construe them as to exclude the exercise of the power. It seems to me that the plain and ordinary meaning of 87
these words is that she meant to dispose of what she then had or might afterwards acquire, be it much or little. His Honor must have felt the weight of this, for he qualifies the words too narrow and technical by the use of the words UNDER THE CIRCUMSTANCES. He admits that

the words of the will will bear the construction we place upon them but insists that they mean more. He says: "It is true that the mention of the distributive share allows it to be said that the instrument might have some effect by means of that interest, but this would not be all the effect the words import,
88 and if the intention to pass all can be discovered, it would seem that such intention ought to prevail."

If we understand the authorities, they hold that if the words of the instrument are fairly susceptible of any other interpretation, they will not be so construed as to execute the power. Blagge vs. Miles, 1 Story, Bilderback vs. Boyce, 14 S. C. The construction we put upon the words it seems to us is fair and reasonable, and if so the power should not be held executed. But we have for this will to operate upon three distributive shares and also the interest on the bond and mortgage
89 debt, a picture and the rents, income and profits of a fine plantation for thirteen years. What more could be asked for to satisfy the words of this will. But it seems to me that the having of any property would satisfy these words, or even had it turned out that she had nothing on the principle that she expected to have it from the words used. But the authorities heretofore cited show that if the will can have ANY effect other than as an execution of the power it will not be held an execution of the power.

But we insist that even had Mrs. Clemson specific-
90 ally mentioned the bond and mortgage in her introductory clause, her will would not execute her power. She had an absolute interest in the bond and mortgage as heir-at-law of her sister Cornelia, as well as a power over a part of it. When she comes to the conveying part of her will she does an act as owner, and that act would be referred to her interest and not to her power. Says Sir Edward Sugden in Vol. I. Chap. 8. Sec. I: "It

is well settled that where a man has both a power and an interest, and does an act generally as owner of the land, without reference to his power, the land shall pass by virtue of his ownership. He has an estate grantable in himself, and also a power to limit a use; 91
and when he grants the land himself, without reference to his authority, it implies his intent to grant an estate as owner of the land, and not to limit a use in pursuance of his power." In Manndrell vs. Manndrell 7 Ves. Jr. 567, Lord Eldon Says: "It is in general clear, where a party has both an authority and an interest and does an act purporting to mean to pass the interest, he shall be held to intend that, and not to exercise his authority." In 4 Kent 334, we have these words: "The general rule of construction, both as to deeds and wills, is, that if there be an interest and a power existing together in the same person, over the same subject, and 92
an act be done without a particular reference to the power, it will be applied to the interest and not to the power." Under these authorities had Mrs. Clemson expressly given the bond and mortgage, without particularly referring to her power, only her interest would have passed.

In this branch of the argument it has been our purpose to show: 1. That even in the introductory clause of her will Mrs. Clemson has not referred to the property over which her power of appointment extended, but if the words therein used specifically refer to any 93
property, it is that to which she took the title, which satisfies every word of the clause. 2. That had she expressed an intent to pass this property, the words of the giving part of her will clearly excludes the second requisite of Mr. Justice Strong, A CARRIED OUT INTENT. 3. That the words she has used in her will tie her hard and fast to a general devise, which never executes a power. 4. That as she had both an interest in and power over this bond and mortgage, had she specific-

94 ally mentioned it in the giving part of her will, without referring to her power, her interest only would have passed.

4. We are thus brought to the last test of intention laid down in the beginning of this argument, to wit: Is there anything outside of the three foregoing tests which can be relied upon as even tending to show an intention on the part of Mrs. Clemson to execute her power, or that she EFFECTED any such intention? We have already considered the will in all its parts and are unable to see anything whatever which could be classed under this test. This being said, it
95 would seem that further inquiry should end, for we insist that both the intent to execute a power and its actual execution must be gathered from the words of the will itself, and that the parol testimony offered by the defendant for the purpose of showing Mrs. Clemson's intent or purpose in making her will is incompetent. The words of the will are plain and intelligle. There is no ambiguity to be explained. The will is a straightforward disposition of her own property, and any parol seeking to put words in it, which would carry property not her own, is going outside of the instrument and contradicting it. The rule is forcibly
96 stated in Wilkins vs. Allen 59 U. S. 18 How, 385 in these words: "That the Court may put itself in the place of the testator, by looking into the state of his property and the circumstances by which he was surrounded when he made the will is true as a general proposition. Such evidence, however, is only admissible to explain ambiguities arising out of extrinsic circumstances as to persons provided for, objects of disposition and the like. For instance, if the testator gave to his grandson J. S. a plantation and he had two grandsons of that name; or he devised his son J. his plantation on a certain river, and he had two planta-
97 tions there in each case proof might be heard to show

the person or thing intended. But evidence cannot be heard to show a different intention in the testator from that which the will discloses. Such is the established doctrine of this Court as was held in the case of Weatherhead vs. Baskerville, 11 How. 357."

Mrs. Clemson has not used terms in her will which are applicable to two persons or two things. Her words are applicable to her own estate and not to that which was the property of another. There is in it no ambiguity. Describing a thing as her own can in no sense be made to include that which was not her own. No evidence which could impute to the testator a different 98
intention from that which the words of this will disclose can be heard. In Weatherhead vs. Baskerville 11 How. 329, the court says: The only safe rule is that where a will is doubtful or uncertain, it must receive its construction from the words of the will itself, and no parol proof or declaration ought to be adduced out of the will to ascertain it. * * * It would indeed be of but little avail to require that a will AB ORIGINEE should be in writing, or to fence a testator round with a guard of attesting witnesses, if when the written instrument failed to make a full and explicit disclosure of his 99
scheme of disposition, its deficiences might be supplied and its inacuracies corrected, from extrinsic sources." See to same effect McKie vs. Story 93 U. S. 589. In King vs. Ackerman 2 Black. 408 the Court after announcing the rule as to ambiguities says, "but no case can be found where such testimony has been introduced to enlarge or diminish the estate devised." See the rule in Illinois laid down in Kurtz vs. Kibner 50 Ill. 514. In Blake vs. Hawkins 98 U. S. the rule is laid down that the intent to execute must appear from the gifts and directions in the will, In Rosboroh vs. Hemphill 5 Rich. Eq. 107, Chancellor Johnson forcibly said: "The law requires wills to be in writing, and we 100

cannot fail to see that the production of parol evidence, to add to or detract from wills thus executed, prostrates the policy of the country and repeals its enactments. How easy to destroy the true will of a Party in his grave, and no longer able to speak for himself.

To cut up fraud and perjury by the roots, the Legislature has said, no witness shall speak on such a point. The testator alone shall speak and speak in his will." In Cunningham vs. Cunningham 20 S. C. 318, the rule is stated to be "where there is no latent ambi-
101 guity in a will, extrinsic evidence cannot be received to show intentions not expressed in the will."

See further on the question of parol.

1. Parol evidence cannot be adduced to contradict, add to or explain the contents of a will.

1 Johns Ch. 231; Jarman on Wills Ch. 14, pp. 359, 358; 11 How. 357; Farror vs. Ayers, 5 Pick. 409; Barrett vs. Wright, 13 Pick. 48; Mann vs. Mann 14 Johns 9. 14; Wigram on will, 1st and 2d rules; Ibid.
102 24, 27, 80-83, 88, 92, 96, 130.

2. Parol evidence is only admissible to explain a latent ambiguity.

1 Greenl. Ev. Sec. 289; Hiscocks vs. Hiscocks 5 Mees. and W., 363, 367; Atkinsons, Lessee vs. Cummings, 9 How, 486; Miller vs. Travers, 8 Bing., 244; 21 Eng. Com. Law, 290; Aspdens Estate 2 Wall. Jr. 448.

Cunningham vs. Cunningham 20 S. C., 318.

3. A testator's parol declarations are not admissi-
103 ble to control the construction of his will.

22 Wenk. 151; 1 Brown. Ch. 447; 10 Wheats. 229. Roberts on Wills, 24, 34.

5. That the testimony of the defendant in this

case as to any transactions or communications between himself and his testator is incompetent. Such testimony is expressly prohibitted by Sec. 400 of the Code of this State and our Court has frequently construed this section and excluded the testimony. This Court will follow these decisions. Robinson vs. Robinson 20 S. C. 567.

It seems to us that the foregoing authorities clearly exclude all the parol proof offered by the defendant and that the judgment of the Court must rest upon the will itself. Nearly the whole of the defendant's own testimony is as to transactions and communications between himself and Mr. Clemson, and therefore incompetent. But suppose the PAROL testimony was competent, what does it weigh? Mrs. Cornish and the defendant himself testify to the fact that Mr. Clemson and his wife had made mutual wills to each other, donating their property to each other, and the survivor was to carry out this purpose and donate the whole to the State for an Agricultural College. This is contradictory to Mrs. Clemson's will itself, and therefore incompetent and entitled to no weight as declarative of her intention which she has herself put in writing. In her will in case she survives her husband she expressly gives all her property to this very complainant. Had she wanted the State to have the property, it would have been so easy to say so. She expressly gave it another way and in the channel of her blood. It is easy to see that the purport of any testimony would be to destroy the written will and make a PAROL will. The testimony of Mr. Lee is that Mrs. Clemson frequently told him after she had made a will that all of her property and Mr. Clemson's too would go to this complainant their only descendant, and told him at the same time she had made a will. So Mr. E. B. Calhoun and his wife who were living with Mrs. Clemson in 1873 when the land was divided, both say that Mrs,

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Clemson said it was all a matter of form, this complainant would eventually get the whole place anyway. The whole of this testimony refutes the idea that she ever intended to give this property to the State. But the
107 witness McLees when he comes upon the stage explains what connection the State had with Fort Hill during the life of Mrs. Clemson. In his direct examination he tells all about the Trescott circular and Mrs. Clemson's committee, but in the cross-examination admits that Fort Hill was offered to the committee for the sum of twenty thousand dollars which the committee could not pay. Mr. Lee and Mr. and Mrs. E. B. Calhoun also tell us that the property was offered to the State for $20,000 and Mrs. Calhoun further says Mrs. Clemson said she had simply given her consent to the sale, but she knew the price was so high they would not give it. It was offered to the State for $20.000. The
108 place is now appraised at $15,000. If there is anything in this that looks like a donation on Mrs. Clemson's part, I fail to see it. It was an effort to sell the property for a good price. She had the power under the will of her mother to consent to a sale of the property and effect the same, but the substituted property was to stand in the place of the original prop-erty. (See clause 20 of the will.)

IN THE SUPREME COURT 1

OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1418.

ISABELLA LEE, BY HER NEXT FRIEND, GIDEON LEE, COMPLAINANT, *Appellant*, 2

vs.

RICHARD W. SIMPSON, DEFENDANT, *Appellee.*

NOTICE OF MOTION.

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The counsel for Appellee will please take notice that on Monday, March 17, A. D. 1890, Appellant will move the Supreme Court of the United States, on the record and proceedings herein, for an order allowing Appellant within twenty days from date of said order to submit printed Brief in reply to printed Briefs allowed to be submitted by Appellee, by order of date January 27, 1890.

(Signed) LEROY F. YOUMANS,
Counsel for Appellant. 4

MARCH 7, ~~1889~~. 1890

This notice has been duly served. At the time of the allowance of the appeal herein from the Circuit decrees, His Honor Hugh L. Bond, Circuit Judge, after consultation with the Chief Justice, who sat with him and presided at the hearing on Circuit, ordered as a *proviso* of the continuance (during the pendency of the appeal) of the injunction (transcript of record, p. 39,

5 fols. 76–78) restraining the Defendant from executing and delivering any deed of conveyance of the Fort Hill plantation to the State of South Carolina, or to any person in behalf of said State, that the Appellant should submit the cause under the Twentieth Rule of the Supreme Court, within the first ninety days of the present term. The nature of the cause made compliance with this proviso absolutely obligatory on the Appellant; for if not complied with, the injunction fell, and a conveyance vesting the property in the State, as
6 a State is not suable, (*Art XI, Amendments to Constitution of United States*, and decisions thereunder,) save by its own consent, would have deprived the Appellant, however successful in her appeal, of all its fruits: these would have been at most the "shell" without the "oyster."

His Honor Hugh L. Bond, the Circuit Judge, and Appellee's counsel were accordingly notified that the Appellant would comply with the proviso, which was
7 done by submitting the cause on printed arguments within the first ninety days of the present term, so that Appellees have had whatever advantage could be derived from having the printed arguments of Appellant from January 11, 1890, the day on which they were filed, with all the time since in which to prepare arguments *contra*. No such obligation resting on Appellee, his counsel did not file their arguments. On January
20 H, 1890, in consequence of certain legislation by the General Assembly of South Carolina, the Attorney
8 General of that State, stating that he is in the cause as representing the State of South Carolina, which he averred to be practically the only party interested on the part of Appellee, moved this Court, in the name and on behalf of the State of South Carolina, to advance the cause upon the docket, and for oral argument therein, in consequence of the great alleged interest of that State in an early hearing. The Appellant not only consented, but in every way co-operated in the effort to have this order granted.

This Court on January 27, 1890, made its order 9
allowing the cause to be submitted on printed briefs on or before the third Monday in March present, at which time Appellant's counsel will for the first time be allowed to see the arguments of Appellee and of the State of South Carolina. Appellant's counsel, to use the happy phrase of one of Appellee's counsel, "will be shooting in the dark," while the counsel on the other side will have had our arguments from January 11. As the reason why Appellant was compelled to 10
have her counsel's arguments filed within the first ninety days of the term as a condition of the continuance of the injunction was in order to prevent the injunction continuing until the cause was regularly reached in call of the docket, a period of three years, as estimated by the Chief Justice—as the Appellant has made no objections, technical or otherwise, to the advancement of the cause, but has co-operated in the effort of Appellee to have an early hearing, and as her counsel are concluded from the privilege of oral reply 11
to arguments for Appellee, she most respectfully but earnestly prays this Court that she may have the privilege of a printed argument in reply to the arguments of Appellee, within a reasonable time, and suggests twenty days from the date of the order granting such privilege as a reasonable time

LEROY F. YOUMANS,
Counsel for Appellant.

LeRoy F. Youmans

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1418.

ISABELLA LEE, by her next friend, Gideon Lee,

Appellant,

vs.

RICHARD W. SIMPSON,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

ARGUMENT OF CALHOUN, KING & SPALDING, OF COUNSEL FOR APPELLANT.

C. G. Burgoyne's Printing Business, Cor. Walker and Centre Sts., N. Y.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1418.

ISABELLA LEE, by her next friend, GIDEON LEE,
Appellant,

vs.

RICHARD W. SIMPSON,
Appellee.

Argument of Calhoun, King and Spalding, for Appellant.

STATEMENT OF FACTS.

On May 13th, A. D. 1854, Mrs. Floride Calhoun owned the plantation known as Fort Hill, in Pickens District, now Oconee County, South Carolina. On that day she and her daughter, Cornelia Calhoun, conveyed Fort Hill, together with certain negroes and personalty, to Andrew P. Calhoun for the sum of $49,000. Andrew P. Calhoun executed his bond, conditioned to pay $40,200 to Floride, and $8,800 to Cornelia as purchase money, and to secure the same executed to them a mortgage on Fort Hill (Add. Transcript, pp. 2 and 3).

On June 27th, A. D. 1863, Mrs. Floride Calhoun made a last will and testament (Transcript, pp. 24, 25), the provisions of which, except as hereinafter set forth, in connection with a codicil subsequently added, are not material.

By a codicil dated 22d January, A. D. 1866, Mrs. Floride Calhoun revoked certain devises made to her daughter, Anna M. Clemson, in said will, substituting for them the following bequests, and further provided in said codicil:

* * * * * *

"2. Three-fourths of my interest in said bond "and mortgage debt, amounting to about forty "thousand two hundred dollars, I hereby give and "bequeath to my daughter Anna M. Clemson, to be "enjoyed by her under clause twenty of the will, and "according to the provisions of that clause to vest in "the same trustee, and to be subject to all the powers, "trusts, conditions and limitations of that clause pre-"cisely as the bequests therein made were subject to "them, with this exception and alteration, that my "daughter Anna is hereby authorized and empowered "by her last will and testament, duly executed by her, "to dispose of this bequest of three-fourths of said bond "and mortgage debt as she pleases. If she does not "thus dispose of it at her death, I give and bequeath "it, the said three-fourths, to her daughter Floride, and "should the said Floride die without leaving issue, I "give and bequeath it at her death to her brother Cal-"houn Clemson; but, nevertheless, Floride shall like-"wise have power to dispose of it at her death as she "pleases, by a last will and testament duly executed by "her.

* * * * * *

"To Anna I also give and bequeath the oil portrait "of my mother, which by clause 5th of my will I gave "to my daughter-in-law Kate.

"3. The remaining one-fourth part of my interest in

" said bond and mortgage debt against the estate of my " deceased son Andrew, I give and bequeath to Floride " E. Clemson, my granddaughter, but if she dies without " leaving issue, I give and bequeath it to her brother, " John Calhoun Clemson. She, nevertheless, is hereby " authorized and empowered to dispose of said fourth " part as she pleases by her last will and testament duly " executed.

* * * * * *

" 5. Should I at any time collect the aforesaid bond and " mortgage debt, or any part of it, or should Fort Hill " be purchased with it, or the money be invested in any " other property, or be retained in hand, the property " thus purchased, the property thus obtained by invest- " ment, and the money thus retained, shall be considered " and held to be in place of, and the same as, the afore- " said bond and mortgage, and shall pass under this " codicil as if the same were still in the form of said " bond and mortgage; that is to say, shall pass to " my daughter Anna and granddaughter Floride, as " aforesaid bond and mortgage debt is directed to be " divided between them" (Transcript, pp. 27, 28).

The powers, trusts, conditions and limitations of said original will are as follows:

" 20. One part, being the fourth of the above residue, " I give and bequeath to my daughter Anna during her " life, and for her sole and separate use, and at her " death I will and bequeath it to her daughter Floride, " and at Floride's death, if she die without issue, I will " and bequeath it to the children of my deceased sons, " John and William, then living, equally among them, " or to their issue, if they be dead, issue to represent " the parents. The better to effect my intentions in " regard to the property in this and in the second " clause, given to Anna, I appoint Edward Noble, of " Abbeville, trustee for it, and vest in him the legal " title. Should Anna at any time wish to sell the " house and lands in Pendleton, or all, or any portion of

" the property given to her for life, the trustee, pro-
" vided it meets with his approval, is authorized to
" dispose of it according to the wishes of my daughter,
" upon having her written request for so doing; the
" proceeds of such sale the trustee shall hold subject to
" the trusts and limitations declared in reference to the
" original property. The trustee is authorized and re-
" quired to invest the proceeds, and also the fourth
" part of the residue herein given to her, in such prop-
" erty or in such way as she may in writing direct, pro-
" vided it meets with his approval. The trustee is
" authorized and required, from time to time, to change
" such investments as often as he may be directed so to
" do by my said daughter in writing, provided it meets
" with his approval, holding always the substituted
" property or reinvestments subject to the trusts and
" limitations aforesaid. If from death or any cause
" there is no trustee, or if Anna at any time shall desire
" to change her trustee, she shall have the power so to
" do, and to appoint another by any instrument in
" writing, under seal, executed by her in the presence
" of two subscribing witnesses. And as often as she
" may desire to change her trustee she shall have the
" power so to do by observing the form and solemnity
" above described" (Transcript, pp. 24, 25).

On March 12th, 1866, Mrs. Floride Calhoun and Thos. G. Clemson, as administrator of Cornelia M. Calhoun, then deceased, filed a bill in equity in the proper State court to foreclose said mortgage on Fort Hill. A final decree for foreclosure and sale was rendered on the 14th day of July, 1871, by said Court (Add. Transcript, p. 3). Pending this suit, on July 25th, 1866, Mrs. Floride Calhoun died. Said will and codicil were duly admitted to probate on 7th August, 1866, Edward Noble, Esq., qualifying as executor. In August, 1869, Floride E. Clemson was married to Gideon Lee, of the State of New York, and died 27th August, 1871, intes-

tate, leaving an only child, Isabella Lee, the present complainant, surviving her (Add. Transcript, p. 2).

On 29th September, 1871, Mrs. Anna C. Clemson made her last will and testament as follows:

"In the name of God: Amen! Whereas, I am en-
" titled to legacies under the last will of my mother,
" Floride Calhoun, and to a distributive share in the
" several estates of my deceased sister, Cornelia Cal-
" houn, and my brother, Patrick Calhoun, and, not-
" withstanding my coverture, have full testamentary
" power to dispose of the same:

" Now I, Anna Calhoun Clemson, the wife of Thomas
" G. Clemson, of the Town of Pendleton, in the County
" of Anderson, and State aforesaid, being of sound and
" disposing mind, memory and understanding, do make
" this my last will and testament in manner following:

" I will, devise and bequeath the entire property
" and estate to which I am now in anywise
" entitled, and which I may hereafter acquire, of
" whatever the same may consist, to my beloved hus-
" band, Thomas G. Clemson, absolutely and in fee
" simple. But should my husband Thomas G. Clem-
" son depart this life leaving me his survivor, or should
" he survive me and then die intestate, in either event
" I will, devise and bequeath my entire property and
" estate, as well as that which I may hereafter acquire,
" of whatever the same may consist, to my grand-
" daughter Isabella Lee, the child of Gideon Lee, of
" the State of New York, absolutely and in fee simple.
" I hereby nominate and constitute Thomas G. Clem-
" son executor of this my will (Add. Transcript, p. 18).

On 13th December, 1871, Edward Noble, having resigned as trustee under Mrs. Floride Calhoun's will, Mrs. Clemson appointed her husband Thomas G. Clemson trustee by instrument in writing, duly executed, which is as follows:

" Whereas, by the will of the late Floride Calhoun,
" of Pendleton, dated June 27th, 1863, and by the

" codicil thereto attached, dated 22d January, 1866, " the undersigned Anna M. Clemson, her daughter, is " entitled to considerable legacies, the legal title of " which is, by the will, vested in Edward Noble, Esq., " of Abbeville County, in said State, as trustee:

" By the 20th clause of the will, confirmed by the 2d " clause of the codicil, the testatrix provides for a " change of trustee in the following manner, viz.: 'If " from death, or any cause, there is no trustee, or if " Anna, at any time, shall desire to change her trustee, " she shall have power so to do, and to appoint another " by any instrument in writing, under seal, executed by " her in the presence of two subscribing witnesses, and " as often as she may desire to change her trustee she " shall have the power so to do by observing the form " and solemnity above described."

" And whereas, the said will and codicil are in the " office of the probate Judge for said County of Ander- " son, having been duly probated on the 7th of August, " 1866, and letters testamentary granted to the said " Edward Noble, as executor, on same date:

" Now, be it known that, in accordance with the " power in me vested by the above recited passage of " my mother's will, I, Anna M. Clemson, of the said " County of Anderson, do hereby nominate and ap- " point my husband, Thomas G. Clemson, of Pendle- " ton, Anderson County, as trustee, under the will, for " property therein bequeathed to me, and also for the " property bequeathed me in the codicil, in the place " and stead of the said Edward Noble, who desires to " be relieved from the trust" (Add. Transcript, p. 10).

The Fort Hill place was sold under said decree of 14th July, 1871, by J. W. Stribling, Special Referee, bought in by Thos. G. Clemson as trustee for Mrs. Anna Clemson on 1st January, 1872, and on 10th June, 1875, said Stribling executed to said Clemson, by order of said equity court, a deed to said premises, said deed being made " to the said Thomas G. Clemson as trustee

" for his wife, Anna M. Clemson; under the will of " Floride Calhoun, deceased." "To have and to " hold all and singular the said real estate with the " hereditaments, privileges and appurtenances, unto " the said Thomas G. Clemson as trustee as afore- " said, his heirs and assigns forever." The consideration for said deed was said mortgage debt bequeathed by said will and codicil of Mrs. Floride Calhoun (Add. Transcript, pp. 7, 8).

On November 5th, 1873, an informal partition was made of said Fort Hill place between said Mrs. Clemson and her trustee on the one side, and complainant and said Gideon Lee as her guardian on the other, and one-fourth of said plantation was set apart to complainant in kind. On 12th September, 1875, Mrs. Anna C. Clemson died. Her said last will was duly probated and said Clemson remained in possession of Fort Hill without interruption until his death. On April 6th, 1888, Clemson died, leaving a last will dated 6th November, 1886, and a codicil dated 20th March, 1887, which were duly admitted to probate 20th April, 1888. (Add. Transcript, 2).

By said codicil Fort Hill is left to defendant Simpson in fee on certain trusts therein set out, and said Simpson constituted executor of said will and codicil. By virtue of said will and codicil, defendant took possession of, and now holds Fort Hill, and receives the rents, issues and profits thereof (Add. Transcript, pp. 11, 15).

On November, 21st, 1888, Gideon Lee conveyed to complainant all of his interest in Fort Hill, or its income (Add. Transcript, p. 10).

On 26th November, 1888, Gideon Lee was, on petition filed in the United States Circuit Court for the District of South Carolina, appointed next friend of Floride Lee (Transcript, p. 2).

On same day complainant through said next friend filed her bill in said Circuit Court to enjoin said Simp-

son from executing the trusts upon which Fort Hill was devised to him, as creating a cloud upon the title thereto; praying that he be treated as complainants trustee, praying for an accounting, that she be decreed to be entitled to Fort Hill, under the will and codicil of Mrs. Calhoun, and denying that Mrs. Clemson had ever exercised the power of appointment vested in her under said will (Transcript, pp. 3, 9, 12).

Simpson answered said bill setting up that the will of Mrs. Clemson was an execution of the power of appointment vested in her by Mrs. Calhoun's will, and that Thomas G. Clemson, therefore, devised Fort Hill to him, legally, on the trusts of his will and codicil (Transcript, pp. 17, 18).

On the trial, the Circuit Court, held that Mrs. Clemson's will executed the power of appointment vested in her by the will of Mrs. Calhoun, and that Clemson died seized of Fort Hill in his own right, and dismissed complainant's bill (Transcript, 44, 45).

At the time Mrs. Clemson made her will, and also when she appointed Thos. G. Clemson, her trustee, the interest on the bond and mortgage on Fort Hill since 25th July, 1866, the date of Mrs. Calhoun's will, had accumulated, and belonged to Mrs. Clemson, absolutely. Her trustee had also received from the rents of Fort Hill $5,276.33, leaving applicable to said interest, after paying for permanent improvements and taxes, the sum of $3,596.03 (Add. Transcript, pp. 4, 6).

The value of the average annual rent during years 1872–3–4–5, was $700 to $800 (Testimony E. B. Calhoun, Add. Transcript, p. 44).

The mortgage debt at date of foreclosure was $65,718.63 (Add. Transcript, p. 4).

Mrs. Clemson's share in Cornelia Calhoun's estate was $601.94 (Add. Transcript, p. 20).

Mrs. Clemson's share in Capt. Patrick Calhoun's estate was $120.49 (Add. Transcript, p. 20).

Mrs. Clemson's share in Hon. Jno. C. Calhoun's estate was $114.71 (Add. Transcript, p. 47).

ARGUMENT.

The great question in this case is: Does Mrs. Clemson's will execute the power of appointment vested in her by the will of Mrs. Floride Calhoun? To a proper determination of that question it is necessary to understand exactly what Mrs. Floride Calhoun did by her testamentary dispositions, and then, what Mrs. Clemson, *under the law*, accomplished by her will.

I.—Mrs. Calhoun's Will and Codicil.

By these instruments Mrs. Calhoun devised to Mrs. Clemson, absolutely, in fee, a valuable portrait, and also three-fourths of her interest in the said bond debt, secured by mortgage on Fort Hill, for and during her, the said Mrs. Clemson's, natural life; and the better to effect her intentions in regard to this property given for life to said Anna C. Clemson, testatrix appoints Edward Noble, of Abbeville, trustee for it, and vests in him the legal title. A power of appointment by will is then given to Mrs. Clemson, and, subject to this power, the remainder to Floride Clemson.

1st. By the clauses above quoted *the legacies* left by Mrs. Calhoun's will were:

To Mrs. Clemson,

A family portrait absolutely.

A life estate, through the intervention of Edward Noble, trustee.

To Floride Clemson (Mrs. Lee),

A vested estate in remainder, in fee, as to three-fourths of said bond and mortgage, and other property left in trust for the use of Mrs. Clemson for life. A vested estate in fee as to the remaining one-fourth of said bond and mortgage.

This exhausts *the legacies* of Mrs. Calhoun's will as it affects this property. The interest which Mrs. Clem-

son had, and the legal estate which she would have held, had not the will created a trustee, would have been only a life estate.

That such trustee was only appointed trustee of Mrs. Clemson's estate—*her life estate*, is evident from a consideration of the bequest in the twentieth clause of the original will, which reads: "I give and bequeath to my "daughter Anna, during her life and for her sole and "separate use, and at her death I will and bequeath it "to her daughter Floride." "The better to effect my "intentions in regard to the property in this and in the "second clause, *given to Anna*, I appoint Edward Noble "trustee for it, and vest in him the legal title." The limitations in the second clause are identical with this, and yet the trustee is appointed only of the property *given to Anna*, and not generally of the property *given to Anna and Floride.*

Clearly, the remainders over were not to be affected by the trust. The trustee was alone for Anna. This is more apparent from an inspection of item 21 of the original will, in which one-fourth of the same property devised in item 20 is left *directly* to Floride Clemson, but with the same limitations after her death, without issue, as are found in items 2 and 20. Again recurring to the 2d item of the codicil, the life estate in three-fourths of said bond and mortgage, is left to Mrs. Clemson, subject to the powers, trusts, etc., of item 20 of the original will; but the remainder to Floride Clemson is left as a legal estate to her without the intimation of a trust, or the suggestion of a trustee.

Note also, that the trust is given to Edward Noble, and the estate vested, is vested in him without any words of inheritance. It is also to be observed that Anna is permitted to change *her* trustee and appoint a new one. It seems nowhere contemplated that the trust or trustee should survive Anna and the duration of her life estate.

As such trustee he did not need a greater estate than

one *pur autre vie*. A trustee takes no greater estate than is necessary for his trust, and the same will be cut down to the necessities of the case.

The power of appointment by will, given to Mrs. Clemson, did not enlarge the express life estate devised to her use.

Mrs. Clemson, therefore, took under this will, a life estate, or rather, she would have taken a life estate if no trust had been declared. The property devised to her was a life estate. She took the beneficial interest in this life estate. The legal estate which would otherwise have vested in said Anna is, however, vested in Edward Noble, trustee. The estate which Edward Noble took was a life estate, *pur autre vie*, viz., for the life of Mrs. Clemson.

" Where an estate is devised to a trustee in fee for " the sole and separate use, benefit and behoof of a " married woman for life, and after her death for the sole " use, benefit and behoof of a person, or a class of per- " sons, who are *in esse* and are *sui juris*, the legal estate " in fee, given to the trustee, is cut down to an estate " commensurate with the separate estate for life of the " married woman (an estate *pur autre vie*), which it is " his duty to preserve, and the statute forthwith exe- " cutes the use as to the residue in the remaindermen, " concerning whose interest the trustee has no special " duty to perform" (4th head-note).

" Where an estate is devised to one for life, with re- " mainder to such persons as the tenant for life or any " other appointor shall direct and, appoint, and, in de- " fault of such appointment, to a person or a class of " persons *in esse*, the remainder is vested, notwithstand- " ing the interposition of the power. The estate is " vested in the remaindermen, subject to be divested " by the execution of the power" (6th head-note).

Williman et al. vs. Holmes et al., 4 Rich, Eq. (S. C.), 475.

The power of sale and reinvestment given to the Trustee on Mrs. Clemson's request does not enlarge his estate. As fully covering the above point, and defining the estates taken under this will, attention is called to the following case.

Trustees under a will (the other provisions of which were not otherwise sufficient to vest the fee in them), being authorized and empowered "to grant and sell the whole or any part" of the testator's "estate, real or personal, with full power to execute any deed or deeds effectual in law to pass a complete title thereto"—it was held that the fee did not vest in the trustees.

Fay vs. Fay et al., 1 *Cush.*, 93, 94.

To the same effect is the following:

"As to the estates devised to Mrs. Hatfield by "the will of her brother, there is no difficulty. He "devises certain estates to her, 'to her sole and sepa- "'rate use for life, wholly free from the interference or "'control of her husband or any future husband, and "'without the same being liable in any possible event "'for his debts or engagements.' This is an express "devise of an estate for life, and is not to be enlarged "to an estate of inheritence by the subsequent pro- "visions, unless they clearly show the intention of the "testator to do so. The power to dispose of the prop- "erty by will or by deed during her life is not incon- "sistent with a life estate."

Hatfield vs. Sohier, 114 *Mass.*, 48–53.

The Supreme Court of the United States have construed a set of limitations, like this in many respects, as here contended for.

"When a trust has been created, it is to be held large "enough to enable the trustee to accomplish the object "of its creation. If a fee simple estate be necessary, it "will be held to exist, though no words of limitation be "found in the instrument by which the title was passed

" to the trustee and the estate created. On the other " hand, it is equally well settled that where no inten- " tion to the contrary appears, the language used in " creating the estate will be limited and restrained to " the purposes of its creation. And when they are " satisfied, the estate of the trustee ceases to exist and " his title becomes extinct. The extent and duration " of the estate are measured by the object of its crea- " tion. * * *

" We are of opinion that the trust estate of the sons- " in-law of the testator was only an estate *pur autre vie*, " and that it terminated at the death of Maria Barr.

The limitations upon the death of Maria Barr if she survived her husband, John Barr, otherwise upon the death of John Barr, were remainder to John Barr's children in fee, if no children then living remainder in fee to John Barr's sons-in-law. John Barr left surviving a daughter, Mary Jane. The question was what estates did this will create.

" We think that it gives:

" 1. A legal estate *pur autre vie*, to three sons-in-law " in trust.

" 2. An equitable life estate, with the usufruct of the " property to John M. Barr.

" 3. In case he should die, leaving issue, and his wife, " Maria, should survive him, then an equitable estate " for life to her with the usufruct of the property, for " the benefit of herself and the surviving child or " children of John M. Barr.

" 4. A vested remainder of the *fee simple* to the " child of John M. Barr, living at the time of the death " of the testator, subject to open and let in the partici- " pation of after born children, and liable to be de- " vested by their dying before their father, but not " liable to be defeated by any other event.

" 5. The devise over to the three sons-in-law was an " alternate or collateral contingent remainder; and if " John M. Barr had died leaving no children surviving

" him, that remainder would thereupon at once have " vested and been converted into an absolute *fee simple* " estate. In no event, except the death of John M. " Barr without issue, did the will give them any inter- " est in the property other than the temporary trust " estate."

Doe vs. Considine, 6 Wall., 458, 471.

The will of Mrs. Calhoun then left an estate for the life of Mrs. Clemson to Edward Noble in trust for Mrs. Clemson, with a vested remainder in fee to Miss Floride Clemson (afterwards Mrs. Lee), subject to a power of appointment by will in Mrs. Clemson. And further created an alternate contingent remainder in favor of Calhoun Clemson in the event Mrs. Lee died without issue, this last remainder being subject to a like power of appointment vested in Mrs. Lee. Mrs. Lee having died intestate leaving issue, this alternative provision of Mrs. Calhoun's will can be dismissed from further consideration.

Miss Isabella Lee, the only child of Mrs. Floride Lee, therefore, is the owner in fee of the remaining three-fourths of Fort Hill, unless the will of Mrs. Clemson operates as an execution of the power of appointment conferred on her by the will of Mrs. Calhoun.

II. Mrs. Clemson's Will.

Turning to that will, let us consider what it purports to deal with and to do.

The will divides itself into two parts:

1. A declaratory preamble which recites the property which the testatrix owns, and proposes to devise and bequeath it, and asserts the existence of a testamentary capacity, despite coverture, enabling her to dispose of the same.

This preamble is much relied on by appellee and is

made the groundwork of the opinion of the Circuit Court.

We submit its true construction leads to exactly a contrary conclusion.

The words used are " Whereas I am *entitled* to *legacies* under the last will of my deceased mother Floride Calhoun, and to a distributive share in the several estates of my deceased sister, Cornelia Calhoun, and my brother, Patrick Calhoun, and notwithstanding my coverture have full testamentary power to dispose of the same. Now," &c.

At the risk of repetition we recur again to Mrs. Calhoun's will. It did two things. It conferred on Mrs. Clemson

LEGACIES :

A valuable portrait ;

And a trust estate in Edward Noble, trustee, for her, Mrs. Clemson's, life.

At the time Mrs. Clemson made her will this trust estate had produced as income, since Mrs. Calhoun's death, assets, to which Mrs. Clemson was *then* absolutely entitled, which made these legacies represent property which were testamentary assets of her own, as follows :

Oil portrait of Mrs. Calhoun	$1,000 00
Rents from Fort Hill in Clemson's hands	3,596 03
	$4,596 03

POWER :

It also conferred on her a power of appointment by will over the estate in fee in remainder, to which as a legacy, under Mrs. Calhoun's will, Floride Clemson was then entitled.

Two things being thus conferred upon her, to wit, *legacies and a power*, she proceeds to dispose of the

legacies. Having both legacies and power, the reference to legacies excludes the idea that she proposed dealing with the power.

The lawyer who drafted this will—able and in no haste (Add. Transcript, pp. 31, 44)—used words which negatives the idea of an execution of the power.

What testatrix proposes bequeathing is that to which, under the will of Mrs. Calhoun she is *entitled*. The word "entitled" carries with it the signification of ownership in the person entitled.

"The words 'to become entitled' mean an acquisition of interest."

In re Clinton's Trust, L. R., 13 *Eq. Cas.*, 295.

What she was *entitled to* were "legacies." "A legacy" is "a bequest or gift of goods and chattels by will."

Anderson Dict. of Law, "*Legacy*," p. 607.
Pratt vs. McGhee, 17 S. C., 432–4.

The plain legal meaning, therefore, of these words of the preamble is, that it is merely the recital of testatrix' own interest in the gift made to her by her mother's will.

1st. It refers alone to the legacies to which Mrs. Clemson is herself *entitled*, at the time of writing this will, under the will of Mrs. Calhoun. It expressly refrains from extending the property proposed to be dealt with to the legacy to which *another* was entitled, and makes no reference to such remainder estate so bequeathed, or a power of appointment as distinguished from the power which one may exercise over his own goods, She seems to confine her reference strictly to her own interest in the subject matter, not mentioning the property as such, but only her shares therein, to which she was entitled—her legacies.

2d. She couples that to which she is entitled under her mother's will with her shares inherited from her deceased brother and sister. She is dealing with her own; she is scheduling her own assets in order that she may not die intestate. The collocation would be unnatural, and the words of this preamble insensible, if construed to embrace the estate in remainder, then vested in Mrs. Lee, and the mere power to appoint thereto reserved to Mrs. Clemson. She says that she is *entitled* to the property she proposes to bequeath; that she holds the distributive shares of the estates of her deceased brother and sister in like manner with the legacies she proposes to will away. She has a common "testamentary power to dispose of the same"—regarding them as a unit—her estate.

3d. She recites her testamentary power, though *covert*, to dispose of *all* of the mentioned property. The same power by which she can dispose of the shares of the estates of her intestate relations is what she here invokes as that to be exercised in disposing of *her* legacies to which *she is entitled* under her deceased mother's will; that the exemption from disability by reason of coverture is one affecting the power proposed to be alike used upon all these assets. This would seem to exclude a reference to a power of appointment utterly foreign to any property which testatrix held as her own.

Where one having two powers makes reference to one of them only, this excludes the idea that he intended to exercise the other.

1 *Sugden on Powers*, *p.* 359.

But aside from this, it is evident that the power to which Mrs. Clemson referred, was her power, as a *feme covert*, to make a will affecting her own property. The disability which had rested on married women to make such a will had only been removed very recently in South Carolina.

Of course, it was this power by which alone she could bequeath her own estate, and it is conceded that she was in this will certainly doing that, hence she must have had reference to this power and had it in her mind. The recent change in the law makes such reference to this general power a natural thing, but this recitation becomes awkward and bungling if applied to Mrs. Clemson's power of appointment over the fee in Fort Hill, vested in Mrs. Lee.

1st. Because it would then make the power of appointment, the testamentary power invoked under which the distributive shares in the intestate estates of Cornelia and Patrick are being bequeathed, which is manifestly absurd.

2d. Because at no time did coverture affect the right of a *feme* to execute a power of appointment, but only the right to will her own property. The recital would lack all pertinency.

1 Sugden on Powers, pp. 181, 182.
2 Hill (s. c.) Ch. R., p. 214.

But there is a good reason why a lawyer drawing the will of a married woman disposing of her own property would commence the same by a recital of what she claimed to be her separate estate and of her testamentary power.

Every lawyer is familiar with the precision used under the old law in drawing papers where a married woman, by virtue of a marriage settlement, contracted, or dealt, with reference to her separate estate. How it was deemed, if not essential to vitality, at least to accurate legal work, that the existence of the separate estate to be affected, and of the power to act with reference thereto, although *covert*, should be specifically set forth. Here is a woman, under all of the disabilities of a *feme covert*, save, as recently specially authorized by law, to deal with her separate estate if she have one. Her lawyer, therefore, in drawing her

will sets forth that she has a separate estate and wherein it consists, in order that she may will such estate, of her own, away, and following his old training, he sets forth the recently acquired power which enables her to deal with that separate estate derived from the three sources named.

In the opinion rendered in the Court below, it is insisted that by the paper substituting Clemson for Noble as her trustee, Mrs. Clemson defines the words "entitled to legacies" by an almost cotemporaneous instrument, in such way as to show that she refers thereby to her power. So far from this being so, we insist that the construction above given to this will is further strengthened by reference to the paper executed by Mrs. Clemson in December, 1871, substituting Clemson as her trustee in place of Noble.

In this paper she uses language which affords an additional definition of the phrase, "entitled to legacies "under the last will of my deceased mother, Floride Calhoun."

Mrs. Clemson, having no authority to change the trusts created and limited by Mrs. Calhoun's will, proceeds to substitute Clemson for Noble, as trustee, and she says:

"Whereas, by the will of the late Mrs. Floride Cal-
"houn, of Pendleton, dated June 27, 1863, and by the
"codicil thereto attached, dated 22d January, 1866, the
"undersigned, Anna M. Clemson, her daughter, is en-
"titled to considerable legacies, the legal title to which
"is, by the will, vested in Edward Noble, Esq., of Abbe-
"ville County, in said State, as trustee.

* * * * * *

"Now, be it known, that in accordance with the
"power vested in me by the above recited passage of
"my mother's will, I, Anna M. Clemson, of the said
"County of Anderson, do hereby appoint my husband,
"Thomas G. Clemson, of Pendleton, Anderson County,
"as trustee under the will for the property therein be-

" queathed to me, and also for the property bequeathed " me in the codicil, in the place or stead of the said " Noble, who desires to be relieved from the trust."

Says the Court below in this case (Transcript, p. 53) : " Clearly the ' legacies ' to which Mrs. Clemson by the " instrument of appointment stated she was entitled " and of which she appointed her husband trustee, were " the same legacies to which by the will she declared " herself entitled, and which she thereby devised and " bequeathed to him."

We have seen that the trustee appointed by Mrs. Calhoun's will was made thereby " her (Mrs. Clemson's) trustee." That he took the legal estate which would otherwise have vested in her, and no more, to wit, an estate for Mrs. Clemson's life, and that then the trust ceased. That the *legacies* to which she was entitled were a life estate, the fee being left as a legacy to Mrs. Floride Clemson Lee.

Here, then, she is dealing solely with her life estate, with no power but to substitute one person for another to hold the *legal title* to the *legacies* to which she is *entitled*, who is so appointed by these words simply to a legal estate *pur autre vie*—viz.: of Mrs. Clemson—and the same language is used in speaking of this life estate as such, as is used in the codicil to her will. Again, she says, whereas she is " entitled to legacies " (using the language almost of her own will), the legal title to which is vested in Edward Noble. Now, this language states that what she means by these legacies, to which she is entitled, are the estates, the legal title to which is in Noble. We have seen that the only estate Noble held the legal title to was Mrs. Clemson's life estate. The legacies named herein can refer therefore solely to her life estate and its accumulations. This would seem to conclude the question that the language in her will referred only to the estates named in the paper of substitution, to wit, her life estate and

its accumulations, and to exclude any reference to the fee, as to which she could not appoint a trustee.

But looking now to the really disposing parts of this will we find no possible construction which will execute this power. What it deals with is the testator's own property, some of which is not mentioned or referred to in the preamble, and some of it contemplated as not then acquired. No one would *exclude* property bequeathed by the *giving* clause, because not named in the preamble, although then owned by testatrix. Surely if the construction above contended for as to this preamble is erroneous and testatrix had mentioned the power and then *not* executed it, by a parity of reasoning the mere mention of it would not work its execution. Says this Court:

"Whether this will was an execution of the power "reserved to her by the deed of her son, referred to in "the introductory clause, whether it was an appoint- "ment of so much of the sum of $50,000 made subject "to her appointment by the deed, as remained un- "disposed of by her, is the most important question "we have now to consider. It must be admitted that "the avowal by the testatrix in the introductory clause "of her will of her purpose thereby to execute the "power was not in itself an execution. It is important "only as it may shed light upon the subsequent "dispositions. A previously expressed intention may "serve to explain the language afterwards used, and "show what its meaning is; but it is one thing to "intend a future act and quite another to carry out "that intention. While it is true that whether a power "has been executed or not, is a question involving a "consideration of the intent of the donee of the power, "it is equally true the intention must be found in the "acts or dispositions of the donee, and not alone in "any previously expressed purpose."

Blake vs. Hawkins, 98 U. S., 315.

Recurring to the bequeathing clause of Mrs. Clemson's will it is " of the entire property and estate to " which I am now in anywise *entitled* and which I may " hereafter acquire, of whatever the same may consist, " to my beloved husband, Thomas G. Clemson, abso- " lutely and in fee simple." Surely this language does not embrace property to which she was *not* entitled, but the title to which was then *vested* in another and over which she held only a power of appointment as the property of another. She deals with *her* property and estate--that which she now owns and that which she may acquire. Coupling the present property, dealt with as her *present* acquisitions, with her future acquisitions, not hinting at any purpose to deal with any other.

Again: To further define what property she is dealing with, contemplating the death of Clemson before her, or intestate, she makes a bequest, in that event, of what she has above described, and bequeaths " *my* en- " tire property and estate, as well as that which I may " hereafter acquire, of whatever the same may consist, " to my granddaughter, Isabella Lee," etc.

It is in testimony in this case that this will was drawn by a very eminent lawyer. (Testimony of E. B. Calhoun. Add. Tr., p. 44.)

It was not drawn for Mrs. Clemson when *inops consilii*, but several years before her death.

It is strange that if it was intended to defeat the inheritance of her granddaugter in the legacy to which her mother, Mrs. Floride Lee, was *entitled* in fee under the last will of Mrs. Calhoun, by appointing another (Thomas G. Clemson) to that estate, to wit: the fee in Fort Hill after the termination of her life estate, to which she was not in any way *entitled*, apter words should not have been found, to carry out this intention. Instead of this, words more apt to convey her own property and more inefficient to exercise the mere power of appointment to the property of another, could not

have been found, than these words, which she uses and then defines as "my entire property and estate," that to which "I am now in anywise *entitled;*" without an allusion to that to which she is *not* entitled, but to which she can only appoint.

The definition of the words controls the meaning.

Property. That which is one's own.

Anderson's Dict. of Law, p. 835.

Estate. The quantity of interest which one has in the things of which he is the owner.

Anderson's Dict. of Law, p. 414.
2 Black. Com., p. 103.
2 Wall., p. 500.

Entitled has been before defined as the acquisition of an interest.

Acquire carries with it its own meaning of interest in the acquirer.

While the words "*My property and estate*" are held to be "adapted to comprehend everything that was and to "exclude everything that was not a part of her prop- "erty. In order to apply them to property not hers we "must reject the pronoun 'my,' and say that by the "phrase 'my estate and effects' she meant to give "what was not her own. This would be not to con- "strue, but to contradict the words of the will."

Jones vs. Curry, 1 Swans. Rep., p. 66.

The words "property," "estate," "entitled," "acquire," exclude the idea of the execution of a power which relates wholly to the estate of another.

"The distinction between property and power, not- "withstanding some attempt to disturb it, is perfectly "settled and so must be borne in mind in considering "this case."

Evans vs. Evans, 23 Beav. R., 1.

"We do not agree that the distinction between prop-

" erty and power is a distinction entirely without a
" difference. This case (a life estate with power to
" appoint to the fee by will) affords a good example of
" a naked power as distinguished from property."

Bilderback vs. Boyce, 14 S. C., 528, 535.

" The difference between a will and an appointment
" by will in this case may seem very slight, but there
" is the material, practical difference between the two,
" that a married woman may make an appointment by
" will by the common law, but cannot make a will ex-
" cept as authorized by recent statutes. The theoreti-
" cal distinction is, that a will concerns the estate of
" the testator and an appointment under a power, that
" of the donor of the power."

Osgood vs. Martin, 141 Mass., 474–7.

The construction above contended for derives great and additional force viewed in the light of the facts then in existence. On the 1st of January, 1872, a few months after this will was made, Fort Hill was sold, and only brought $15,000, making three-fourths thereof worth only $11,250. Now, Mr. Clemson had received on this mortgage, applicable to the interest thereon, the sum of $5,276.33 from 1866 to 1871. As years rolled on, the rents, issues and profits of Fort Hill would have accumulated, and this legacy then amounted to a sum of several thousand dollars, and might, as years went on, have largely increased.

The estate of Andrew P. Calhoun owed the balance of the mortgage debt, amounting to some $50,000. It was prosecuting, with some hope of success, a cotton claim against the United States, and if a recovery was had thereon, a large sum of interest, belonging to Mrs. Clemson absolutely in fee, would be realized on her legacy. So that the accumulations on the legacy of the life tenant made her legacies under her mother's will of

considerable present, and of large prospective value, a value probably exceeding that of Fort Hill.

This makes very sensible the allusion to these legacies as, my property, and reconciles the entire will, if we abandon the effort to torture these words into an execution of a mere power; and it gives to Mrs. Clemson's will, to operate on, the following property (Add. Transcript, pp. 4, 6, 20, 44, 47):

	Value.
Legacies under Mrs. Calhoun's will:	
Picture	$1,000 00
Life estate rents in Clemson's hands at time of will	3,596 03
Interest due from estate of A. P. Calhoun:	
Future rents from Fort Hill (estimated $800 per annum) at date of Mrs. Clemson's death amounted from 1871 to 1875 to	3,200 00
Distributive share estate Cornelia Calhoun	601 94
Distributive share estate Patrick Calhoun	120 49
Distributive share estate Hon. Jno. C. Calhoun	114 71

She would have an additional reason to give these sums to Clemson, as it would relieve him, as her trustee, from any necessity to account for any sums used during her life, to her granddaughter, who would have been one of her heirs at law had she died intestate.

We confidently insist, therefore,

1st. That Mrs. Clemson's will only bequeaths her own property.

2d. That it does not execute her power of appointment.

3d. That it contains no reference to the property

over which she holds a power of appointment, to wit: Mrs. Lee's remainder.

4th. Nor to the power itself.

5th. That even if referred to, her will expressly devises and bequeaths her own property alone.

6th. That it does not clearly show any intent to execute the power, but, on the contrary, by its language and the reference to her own legacies, and to her testamentary power over her own effects, and her silence as to property not hers, of which she could dispose, and of her additional power as to such other property, clearly shows that she was not executing the same.

7th. That it is entirely operative without having to resort to this property which she does not own.

III. Ambiguity and Parol Evidence.

There is no ambiguity in this will. The construction contended for is the result of a natural and legal interpretation of the language used, and to engraft any other meaning thereon would, it is submitted, be contrary to law. Nor is any parol proof of a different intent admissible. To allow the same would not be to construe the will, but to make a new and different one.

" Proposition II. *Where there is nothing in the con-*
" *text of the will from which it is apparent that the testa-*
" *tor has used the words in which he has expressed him-*
" *self in any other than their strict and primary sense,*
" *and where his words so interpreted are* sensible with
" reference to extrinsic circumstances, *it is an inflexible*
" *rule of construction, that the words of the will shall be*
" *interpreted in their strict and primary sense and in no*
" *other, although they may be capable of some popular or*

" *secondary interpretation, and although the most con-*
" *clusive evidence of intention to use them in such popular*
" *or secondary sense be tendered.*"

" So, although in the case of a devise of ' my real es-
" tate ' property subject to a power may pass, where
" there is no real estate to satisfy the devise; yet if
" there be *any* real estate upon which the will can oper-
" ate, it otherwise."

" So personal estate subject to a power will not pass
" under the words ' my personal estate,' whether the
" testator has personal estate at the time of making his
" will or not; for as personal estate acquired after the
" date of the will would pass by the will, it might pos-
" sibly have had a sensible construction without de-
" parting from the strict meaning of the words."

Wigram on Wills, p. 66.

But admitting the testimony offered in this case and analyzing it, it makes in our favor.

The testimony most relied on is that of

R. W. Simpson (Add. Transcript, pp. 25–34).

Mrs. C. D. Cornish (Add. Transcript, pp. 34–36).

These witnesses testified that Mrs. Clemson desired this property to go as an agricultural college, and that she and Clemson made mutual wills to each other of their property, to the end that the survivor might donate the property to the State as such college.

Now, if this testimony is to be believed, it conclusively proves that Mrs. Clemson did not intend Fort Hill to pass by the will in this record. For, contemplating that she might survive Clemson, or he might die intestate, she leaves all of the property bequeathed by this will to Isabella Lee. If it be true that she wished to leave Fort Hill as a college, and had agreed with her husband to do so if she survived him, this will here produced was not intended to deal with Fort Hill.

And if this testimony be untrue, as it must be, so far as the dishersion of Miss Lee is concerned, in the light

of the actual will, the reason why Mrs. Clemson should give Fort Hill to Clemson, insisted on here, also fails; and, if defendant be correct, we see the strange sight of the granddaughter, who, in a certain event, is made the beneficiary of this will, stripped by her own grandmother of the estate in remainder, of which she then stood, as her dead mother's child, vested.

Complainant's contention is in harmony with the testimony of Mrs. Sallie Calhoun, who testified that Mrs. Clemson said the partition between herself and Miss Lee in 1873 was a mere form, it would all go some day to Isabella Lee (Add. Transcript, p. 45).

We claim that, under the rules of law governing this case, it must result that Mrs. Clemson's will did not execute this power of appointment, and that Clemson having in 1875 taken title to himself in fee simple to Fort Hill as trustee, a resulting trust arose in favor of complainant, and she is entitled to recover it from the present claimant.

IV. Rules Governing Execution of Powers.

The rules of law governing the construction of a will, in determining whether a general devise is an execution of a power, have been well settled.

There may be considered to be three sets of decisions upon the subject:

1st. The decisions of the English Chancery, and American Courts following same, as to the law prior to the Statute of William IV.

2d. The decisions of certain American courts construing these rules of the English Chancery.

3d. The rule laid down by the Statute of William IV. and by those American courts which repudiate the

former rules of the English Chancery and adopt in their stead that prescribed by the Statute of William IV.

1st. The rule laid down by the English courts as the law prior to the Statute of William IV. is well stated in the case of Roake vs. Denn (19 E. C. L., 139), in which it was held "that in no instance has a power or authority "been considered as executed unless by reference to "the power or authority or to the property which was "the subject of it, when, unless the provision made by "the person entrusted with the power would have been "entirely ineffectual,' except it were considered as an "execution of such power."

2d. Mr. Justice STORY in case of Blagge vs. Miles (1st Story, 426), lays down the following, which may be termed the American construction of the rule in such cases, which, recognizing the tests proscribed by the English rule, adds, as a further canon of interpretation, that the power will be deemed executed, "If the in-"tention to execute the power is apparent and clear, so "that the transaction is not fairly susceptible of any "other interpretation. If it is doubtful under all "the circumstances, then that doubt will prevent it "from being deemed as an execution of the power."

3d. The other line of authorities repudiates the English rule and adopts that of the Statute of William IV., viz., "that a general devise or bequest should be con-"strued to include any real or personal estate of which "the testator has a general power of appointment "unless a contrary intention should appear by his "will."

In this case we are entirely content to take either the rule as laid down by the English House of Lords in Roake vs. Denn, or the rule as pronounced by Mr. Justice STORY. In either event, if the argument heretofore made is correct, the will of Mrs. Clemson

does not satisfy the rules of interpretation, and does not amount to an execution of the power.

In its opinion, the Court below relies upon the class of authorities which repudiates the rules of the English chancery, and relies upon the rules of the third class above stated, derived from the statute of William IV. A brief review of the authorities cited will demonstrate that they are not in point upon the proper construction of the execution of the power under either the English rules prior to statute of William IV. or the decision of Mr. Justice STORY, above quoted, but that, on the contrary, they recognize that the decision of the questions involved would have been different, but for their departure from these rules. Taking first the decision quoted from Massachusetts, which presents the following state of facts :

Testatrix, in the State of Maryland, having a life estate in the property of her father, who died domiciled in Massachusetts, over which property she had a power of appointment by will, executed in the State of Maryland her will, which, after the formal parts, read as follows :

" I devise and bequeath all the real and personal estate to which I shall be entitled in law or equity at the time of my decease unto my husband, Skipwith Wilmer aforesaid, his heirs and assigns, absolutely."

On the question whether this will executed the power of appointment under the law of Maryland, or under the law of Massachusetts, and what law governed it, the Court says :

" The decisions of the Court of Appeals of Maryland
" which are made part of the report on which the case
" has been reserved for our determination clearly show
" that the law is settled in that State in accordance
" with English cases decided since the American
" revolution ; and that the intention to execute a
" power of appointment must appear by a reference in
" the will to the power or to the subject of it from the

" fact that the will would be inoperative without the " aid of the power. Mory vs. Michael, 18 Md., 227, " 241 ; Michael vs. Mory, 26 Md., 239, 259 ; Mary- " land Society vs. Clendenen, 44 Md., 429, 435 ; and " that it is also settled upon principles everywhere recog- " nized that the admission of a will to probate estab- " lishes only its validity as a testamentary instrument, " and does not determine the extent of its operation. " Michael vs. Baker, 12 Md., 158 ; Schley vs. McCeney, " 36 Md., 266, 275. As the will of Mrs. Wilmer does " not mention the power nor the subject of it, and as " she had other property of her own upon which her " will could operate, it is clearly not a sufficient execu- " tion of the power under the law of Maryland.

" But in this Commonwealth, the decisions in Eng- " land since our revolution and before the St. of 7 Will. " IV. and I. Vict. c. 26, § 27, have not been followed. " The Court has leaned toward the adoption of the " rule enacted by that statute as to wills thereafter " made in England, namely, that a general devise or " bequest should be construed to include any real or " personal estate of which the testator has a general " power of appointment, unless a contrary intention " should appear by his will," etc.

Sewall vs. Wilmer, 132, *Mass.*, 131, 134.

Mrs. Wilmer's will is almost in the language of the disposing parts of Mrs. Clemson's will, certainly it is as comprehensive. This case recognizes that it does not execute the power of appointment, construed by the English rule. The decision also holds that if the property to be affected under the power had been located in Maryland, the Maryland law would have governed, and the power would not have been executed. But that the Massachusetts law governed the property being in Massachusetts. In the case at bar the South Carolina decisions agree with Maryland. The property was in

South Carolina and this case therefore decides that Mrs. Clemson's will did not execute the power.

The case of White vs. Hicks, 33 N. Y., 353–407, repudiates the English rule as of force in New York—Denio, Judge, saying, after reviewing and criticising the English decisions:

"I feel confident that we ought not to follow a rule "thus condemned, and which has been abolished in "the country by whose courts it was established."

In the case of Funk vs. Eggleston, 92 Ill., 515, cited in the Circuit Court, the Supreme Court of that State relies for its decision, mainly on the case of Nowell vs. Roake, as decided at Common Pleas, citing Ch. J. BEST'S opinion, and the dicta of Judges expressing individual dissent from these very rules they felt themselves bound by, and were enforcing.

The Court condemns the opinion in the case of Nowell vs. Roakes in King's Bench reversing the Court of Common Pleas, and the opinion in the House of Lords in the same case affirming the King's Bench and reversing the Common Pleas and cites as precedent for its ruling the Massachusetts decisions, above explained, and the Court says of the rules admitted to be the English law:

"The demands of substantial justice do not require "we should follow the subtle niceties of some of the "English cases, and such course would be inconsistent "with the liberal rules we have heretofore announced "should govern in the ascertainment of the intention of "testators."

There is no case, which admits the English law as the rule of property, which concurs with the above cases. All of these cases, ruling against our contention, expressly repudiate the English rule. But these cases, so far from affording any authority for the decision of this case in accordance with their views, expressly rule that *they do not lay down the rule of decision at common law*, as announced by the English cases, and that they

are not authority as to what it is, or what should be the decision here, except negatively. From this standpoint, they are decisions in our favor; as they admit that under the rules of the Common Law they would have been decided differently, and therefore expressly decline to follow or be led thereby. In fact, Funk vs. Eggleston, 92 Ill., 515, is all fours with the leading case of Denn vs. Roake, 4 Bligh N. S., 1 (House of Lords), and reaches exactly the opposite conclusion, not by holding that it has laid down the Common Law, but by holding that the Common Law rules, as there laid down, have never been adopted in Illinois.

But even the case of Funk vs. Eggleston does not involve so radical a departure from the rules of construction laid down at common law as would the case at bar. In that case the difficulties of adopting any other construction would perhaps have warranted the finding that the power was executed, without laying down the principles which the case does decide. Be that as it may, however, it clearly lays down rules which destroy its force as authority in any State which has adopted the old English rule.

In the case cited from Mississippi the following extract shows how far it fails to support the contention made in the opinion of the Court below. It rests specifically upon the statement that the most important provisions of the will would necessarily fail unless the power was considered as executed thereby.

"By the residuary clause the testatrix after provid-
" ing for the payment of all expenses and legacies, be-
" queathed the balance of her estate to her two children.
" It does not appear that she possessed when the will
" was made, (and her death took place immediately
" afterwards), any estate, real or personal, that was not
" covered by the power, except one slave which was dis-
" posed of by a previous bequest. That slave conse-
" quently did not pass to the residuary legatees. From
" all that appears by the record, or on the face of

" the will, if it did not operate upon the property " covered by the power, which was then in the possession of the testatrix, it must of necessity fail in its " most important provisions. Most of the specific legacies would be defeated, and the provision for her two " children, which we must suppose her main purpose, " frustrated. Her intention is not to be doubted. She " meant to execute the power or she meant nothing."

Andrews vs. Brumfield et al., 32 Miss., 107–117.

V. Rule in South Carolina.

But the question is not an open one in the State of South Carolina, she having declared by her Supreme Court that the rules of the common law as laid down in the case in 19 E. C. L., 139, above quoted, are the rules which govern the construction of a general devise as executing a power of appointment in that State.

In the case of Bilderback vs. Boyce (14 S. C., 528–535), the Supreme Court of South Carolina recognizes the English rule, viz.: " that the Court would infer an " intention to execute the power only in three cases: " First, where the same referred in the will or other " instrument to the power; second, or referred to the " property which is the subject, and which is to be executed; third, or where the provisions in the will " would have no operation except as an execution of the " power."

In reply to the argument that the Court should not adopt this rule, but that of the Statute of William IV., they say, " that while the rigid enforcement of the " rules of construction, before referred to, may have, in " some instances, run counter to the actual intention, " which sometimes happens in the application of other " rules for the construction of wills, we do not appreciate the objection to the full extent urged. Upon

" such a subject it is necessary to have rules ; other-
" wise we should be absolutely at sea."

Because of the important bearing of this decision upon this case, we quote it at length.

McGowan, A. J. :

" The late Ker Boyce departed this life in 1872,
" leaving a will whereby he devised (the Merchant's
" Hotel), &c., to James J. Boyce *et al.*, executors, *in*
" *trust*, to permit his son, Samuel P. Boyce, to take the
" income for his own use and maintenance during his
" natural life, and after his death to the use of such
" person or persons as he, by his last will, might ap-
" point, or, on failure of such appointment, to his
" children or their issue living."

* * * * * *

" Samuel J. Boyce left a will by which he provided
" as follows : '1. I direct that all my just debts be first
" ' paid. 2. I give and bequeath one moiety of all the
" ' rest and residue of my estate whatever to my beloved
" ' wife, Mary E. Boyce, for her absolute use and behoof
" ' forever. 3. I give, bequeath and devise the other
" ' moiety of all the rest and residue of my estate, what-
" ' ever and wherever, to my brother James P. Boyce,
" ' *in trust* for my children, (naming them), upon the
" terms and conditions therein expressed.' This was a
" proceeding for possession of the said hotel, instituted
" by the children of Samuel J. Boyce against James P.
" Boyce as trustee, and Mary E. Boyce, widow of
" Samuel J. Boyce, who alleged that the power of ap-
" pointment given to their father, Samuel, J., was never
" executed, and that his interest for life having ended,
" they are entitled to said premises as remaindermen
" under the will of their grandfather, Ker Boyce. The
" defendant resisted the claim, alleging that the will of
" Samuel J. Boyce, although in general terms without
" any reference to the power, *was a good execution* of
" the power, etc.

* * * * * *

"The question has often been made before the courts "in England and in most of the States of the Union; "but it is said that it is now presented for the first "time in this State. The precise point is, whether a "mere power to declare by will uses in a lot of land, is "duly executed by a will in general terms disposing of "the whole estate of the donee of the power, without "any reference in terms to the power or the property, "and where the donee's own property satisfies the "terms of the will.

"All the authorities agree that this is a question of "intention. Samuel J. Boyce had the power to appoint "by will. He made a will disposing of his whole "estate. Did he intend thereby to execute the power "as to the hotel? Intention is a matter of fact, and "must be reached through the will itself. In order to "facilitate the inquiry as to the intention in such cases, "the Court of Chancery in England, after much divis- "ion and many efforts, at length settled certain rules "to be followed. Without going into the learning in- "volved, or attempting to review the numerous cases "upon the subject, we content ourselves with a refer- "ence to those rules as stated in the cases cited "in the decision of Doe & Nowell vs. Roake, "9 E. C. L., 497, which was carried by writ of error to "the King's Bench (11 E. C. L., 653; 5 B. & C., 720), "and from King's Bench to the House of Lords, where "the judgment of the King's Bench was affirmed (19 "E. C. L., 139). In that case it was solemnly decided "that the Court would infer an intent to execute a "power only in three cases: *First*, where there was "some reference in the will, or other instrument, to the "power. *Second*, or reference to the property, which "is the subject on which it is to be executed. *Third*, "or where the provision in the will would have no "operation except as an execution of the power.

"According to this canon of interpretation, the

" power in this case is clearly not executed. The Mer-
" chants' Hotel is not mentioned in the will of Samuel
" J. Boyce, nor is the power referred to, and the terms
" are satisfied by the property which he left, without
" including that as to which the power existed.

" But it is strongly urged upon the Court, that as
" the point involved is now for the first time to be de-
" cided in South Carolina, we are not complicated by
" previous decisions, and are at liberty to make a rule
" of our own—that the old rule of the English Chan-
" cery should not be followed by us, for the reason, that
" in its operation there, it was not entirely satisfactory,
" resulting often in defeating, instead of carrying out,
" the intention. It is true that some eminent English
" Judges have expressed themselves to that effect, and
" that for this or some other reason, laws have been
" passed in England which declare that a general de-
" vise of real or personal estate in wills should operate
" as an execution of the power of appointment of the
" testator over the same, unless a contrary intent should
" appear in the will (7 Will. IV; 1 Vict., c. 26, § 27 e.).
" These statutes are certainly not of force as law in this
" State, but the principles and practice of the old En-
" glish Chancery announced and followed by the great
" masters of equity—Somers, Hardwicke, Eldon
" and others, have been generally regarded with
" the greatest respect, and as the highest author-
" ity, if not absolutely binding upon us. The
" Court of Chancery was originally established in
" South Carolina, while a province of Great Britain, in
" 1721, and was 'empowered to have and exercise the
" ' same jurisdiction in hearing, adjudging and determin-
" ' ing all causes and suits in equity in as full and ample
" ' a manner as any Chancellor, Court, or Courts, of
" ' Chancery in America can, may, or ought to do.'
" While the rigid enforcement of the rules of construc-
" tion, before referred to, may have, in some instances,
" run counter to the actual intention, which sometimes

" happens in the application of other rules for the con-
" struction of wills, we do not appreciate the objection
" to the full extent urged. Upon such a subject it is
" necessary to have rules, otherwise we should be ab-
" solutely at sea. The execution of a power is not an
" ordinary matter, but is out of the usual course of
" things. It is encumbent upon the donee of the power
" to do the act ; if not done, certain consequences of im-
" portance follow, and it would seem to be in accordance
" with the analogies of the law, that those who claim
" under the appointment, should be held to show satis-
" factorily that it was made. In a large majority of
" cases testators dispose only of their own estates.
" These wills, which embrace also the execution of a
" power, are exceptions to the rule. When, therefore,
" a testator having property leaves a will disposing of
" it in the usual manner, without any reference to a
" power, the inference, in the absence of other proof, is
" that the will is not one of the exceptions, but, as it
" purports, disposes only of the estate, proper, of the
" testator. If the will were intended to refer to and
" accomplish a matter, so remarkable as the execution
" of a power, the part intended to make the appoint-
" ment would naturally be separate and distinct from
" the other parts. Every instrument executing a power
" should mention the estate or interest disposed of ;
" and it is best to declare it to be made in exercise of
" the power, and the formalities, required in the execu-
" tion of the power, must appear on the face of the in-
" strument." (4 Kent, 329.)

" In most of the States of the Union, which have no
" legislative enactments on the subject, there has been,
" as we understand it, a general acceptance, with some
" modifications, of the rule followed in the English
" Chancery. These modifications, for the most part,
" are upon the point of allowing proof of the circum-
" stances under which the will was executed, so as to
" allow it to be read in the light of these circumstances.

" The cases are not in accord and we will not encumber " this opinion by referring to them. If there can be " said to be a distinct American doctrine upon the sub- " ject we do not know that it is anywhere better stated " than by Judge Story in *Blagge vs. Miles*, 1 Story, " 426, cited in a note to 2 Eq. Jur., § 1062. In that " case the rule of construction before referred to was " stated, and the Judge in commenting says: 'The " 'authorities on this subject may not all be easily " 'reconcilable with each other, but the principle fur- " 'nished by them, however occasionally misapplied, is " 'never departed from if the donee of the power intends " 'to execute the power; that intention, however mani- " 'fested, whether directly or indirectly, positively or " 'by just implication, will make the execution valid and " 'operative. I agree that the intention to execute the " 'power must be apparent and clear so that the trans- " 'action is not fairly susceptible of any other interpre- " 'tation. If it is doubtful under all the circumstances, " 'then that doubt will prevent it from being deemed " 'as an execution of the power.'

" We are content to take this as the result of all the " American authorities, which declares that the inten- " tion to execute must be *apparent and clear so that the* " *transaction is not susceptible of any other interpreta-* " *tion*. Taking this as our guide, did Samuel J. " Boyce intend by his will to execute the power in " reference to the Merchants' Hotel? His will makes " no reference to the power, or the property— " it contains no expressions such as are usually " employed in executing powers, but only the words of " ordinary disposition, providing first for the payment " of debts, &c. The testator had property of his own " which fully satisfied the terms of the will, which, " from anything that appears on its face, might have " been prepared by one who had no knowledge of the " power or the existence of the hotel. Before deciding " the question whether the property as to which the

" power existed passed under the will of Samuel S.
" Boyce as part of his own estate, it is proper to inquire
" what the power of appointment was; whether it was
" part of his 'estate,' in such sense as under that de-
" scription alone it would pass under his will. Samuel
" J. Boyce, never had any estate in the Merchants'
" Hotel. It belonged to his father, who gave it to
" trustees 'to permit his son, Samuel J., to take the in-
" 'come for his own use and maintenance *during his*
" '*natural life*,' with power of appointment, and on
" failure of such appointment, to his children.

" The remainder-men *in esse* under the will of Ker
" Boyce took a vested interest, subject to be divested
" by the execution of the power. Williman vs. Holmes,
" 4 Rich. Eq. 476. The power could be exercised only
" by will, which took effect at the death of Samuel J.,
" when his interest even in the income ended; so that
" at the time the will took effect the testator had no
" property interest whatever in the hotel. We do not
" agree that the distinction between *property* and
" *power* is a distinction entirely without a difference.
" This case affords a good example of a naked power
" as distinguished from property. * * * The words
" in the residuary clause are very comprehensive, 'what-
" 'ever and whenever,' but they do not reach to the
" hotel, for the reason that they refer in terms to the
" testator's 'estate.' The expression 'all the rest
" 'and residue of my estate of every nature
" and kind," in Blagge vs. Miles was said to be incap-
" able of passing property over which testator had only
" a power. These words mean that the testator does
" not intend to die intestate as to any part of his
" estate, and they generally mean nothing more. Lup-
" ton vs. Lupton, 2 Johns. Ch., 623. Looking at the
" terms of the will, and all the surrounding circum-
" stances, it does not appear that the intention of Sam-
" uel J. Boyce to execute the power under his father's
" will was 'apparent and clear,' and we think the trans-

" action is fairly susceptible of the interpretation that " he meant to dispose of his own estate, and not to " execute the power as to the Merchants' Hotel."

This is a rule governing the transmission of property in the State of South Carolina, and as such will be followed by this Court :

" Where any principle of law, establishing a rule of " real property, has been settled in the State Courts, the " same rule will be applied by this Court that would " be applied by the State tribunal."

Jackson vs. Chew, 12 Wheat., 153–162.

" The opinion of the Court in the case of Kennedy " vs. Marsh (2nd McCord, 252), was an able and delib- " erate one. It was a judicial construction of the will " of Mr. Laurens, according to their view of the rules " of the common law in that State as a rule of property, " and comes within the principle adopted by this Court " in Jackson vs. Chew, 12 Wheat., 153–167, that such " decisions are entitled to the same respect as those " which are given on the construction of local statutes."

Henderson et ux. vs. Griffin, 5 Pet., 151, 155.

To the same effect are also—

Beauregard vs. New Orleans, 18 How., 497.
Suydon vs. Williamson, 24 How., 427.
Orvis vs. Powell, 98 U. S., 176.

The Supreme Court of South Carolina having approved of the English cases as the rule of property in that State, and trying this will by the application of these rules, we insist that testatrix in speaking of *legacies* to which *she* was *entitled*, and devising the property to which *she* was *entitled*, and speaking of it as *my* property and estate, having some property upon which it could operate, excluded a reference to, or execution of, the power of appointment.

The rules of the Common Law are well and tersely stated by Chancellor Kent, as follows:

"In the case of wills it has been repeatedly declared, "and is now the settled rule, that, in respect to the "execution of a power, there must be a reference to the "subject of it, or to the power itself, unless it be in a "case in which the will would be inoperative without "the aid of the power, and the intention to execute the "power became clear and manifest" (4 Kent's Comm., marg. p. 334).

The following leading English cases are quoted at some length, showing the strictness of the rules recognized as the law of South Carolina in Bilderback vs. Boyce, *supra.*

Webb vs. Honnor, 1 Jac. and Walker, 372:

A testator having a life estate in £600 of 3 per cent. consols, with a power to appoint by will, and said funds being held in trust to pay the income therefrom to said testator for life, made the following will:

"And as to all and singular of the whole of my per- "sonal estate, consisting of money invested in the pub- "lic funds, household furniture, plate, money, watches, "trade and all and the whole of every such property "as I may be in possession of or in anywise entitled to, "at the time of my decease, I do hereby give and dis- "pose and bequeath unto my beloved wife," etc.

The fact that testator had no other property in the funds was stated in the bill and admitted in the answer.

The Master of the Rolls (SIR THOMAS PLUMER): "I "think there must be something more than there is in "this will before we can break in upon the general "principle established by the cases referred to. There "is not on the face of the will any reference to the "power; that is not necessary to make it a good exe- "cution, but the defect must be supplied by very clear "internal evidence of the intention. Now in this in-

" strument there is nothing to show that the testator " meant to dispose of anything but his own property, " every part of it, is satisfied by giving all that he was " possessed of."

Lovell vs. Knight, 3 Sim., 275 :

A married woman having power to appoint leaseholds and stock, held in trust for her benefit for life, by her will, executed and attested as required by the power, but not referring to it, gives to her husband the whole of her property, both real and personal, and whatever she might possess at her decease. The only property subject to be affected by this will were said leaseholds and stocks. The testatrix own property consisted solely of £112, 18s, 9d, accrued rents and dividends in the hands of the trustees. These were insufficient to pay the debts due from testatrix on account of her separate estate."

Vice-Chancellor (SIR L. SHADWELL):

" I do not think that if this person had intended to " dispose of all her property, more comprehensive and " general terms could have been selected than are here " used, and I apprehend it to be perfectly settled that " whenever a will is couched in such terms, as that, upon " the face of it, it appears to express an intention to " pass the general property which may belong to the " party making the will, such a will shall not be deemed " an execution of the power with regard to any specific " property."

This case was affirmed on appeal. See as to this, and for a similar ruling on a like will: *Lempriere vs. Valpy, 5 Sim., 108.*

Jones vs. Tucker, 2 Merivale, 533 :

" Mary Mones, by will, devised to Tucker all her freehold and copyhold estates upon trust to permit Elizabeth Smith to receive the rents, etc., during her life, and after her death upon trust to sell the same,

and out of the produce pay £100 to such person or persons as the said Elizabeth Smith shall by her last will appoint. Elizabeth Smith survived Mary Mones and made her will as follows:

" 'I will and bequeath to Mrs. Mary Jones the sum of '£100, likewise the whole of my household furniture, 'plate and linen, etc. Whatever remains to me for 'rent from Mr. Tucker, is to discharge my rent and 'funeral expenses.'

" The bill charged that Mrs. Smith, at the time of " her death, did not possess any personal estate, save a " few articles of household furniture; that she had " often, before her will, expressed and declared it to be " her intention to give to Mary Jones the £100, over " which she had the power of appointment. No evidence " was taken. The answer did not traverse the allega- " tions of the bill.

The Master of the Rolls—(Sir William Grant):

" Here it is alleged that the testatrix had no property, " except a few articles of household furniture, which " she has specifically bequeathed. Some property, " however, she had; she speaks of rent due her, as well " as household furniture, plate and linen. Then what " is to be the *quantum* of property that shall furnish " the criterion for deciding whether a testatrix, making " a bequest, is or is not exercising a power? It is not " like an inquiry whether there be anything *but copy-* " *hold* to answer a devise of land. The question then is, " whether there was anything for the devise to operate " upon at the time when it was made? A will of per- " sonalty speaks at the death; the state of that descrip- " tion of property at the time of the will does not fur- " nish the same evidence as to the intention. In Nannock " vs. Horton, the Lord Chancellor referring to Andrews " vs. Emmott, and other cases of that class, takes it to " be settled, 'that you are not to inquire into the cir- " 'cumstances of the testator's property at the time of " 'the will to determine whether he was executing the

" ' power or not.' In my own private opinion, I think " the intention was to give the £100, which the testa- " trix had the power to dispose of, but I do not con- " ceive that I could judicially declare the power to have " been executed, even if the result of the investigation " should verify the representation that is made as to " the state of her property."

Tanner vs. Bradford, 3 Eng. Chanc. Repts., 355 (head notes):

" Where, under a settlement, a testator had, in a cer- " tain event, conveyed the estate, subject to a term, " and had, under the same settlement, a power, in the " particular event, to appoint a fee, subject to the term, " by deed or will, and by his will he devised the estate " in fee, without reference to his power, the will takes " effect as a devise of his interest, and not as an execu- " tion of his power.

" By the same settlement, he had, in the event it " happened, a power to appoint a sum of £1,000, " which was to be raised after his death by the term to " which the fee of the same estate was subject; but his " will took no notice whatever of this power; the de- " vise of the estate does not operate as an execution of " the power to appoint the £1,000."

Roake vs. Denn, 4 Bligh, N. S., 1:

Sarah Scott was seized of lands in the County of Surrey, as to one moiety in fee, by descent. The other moiety was limited to her for life, with power to appoint an estate in fee by deed or will, with remainders over, in default of appointment. Sarah, by her will, devised all of her freehold estates in the County of Surrey to John Roake, for life, conditioned that out of the rents he should keep them in repair; at his death, the lands chargeable with an annuity, were by this will devised to the children of John Roake. Sarah died, leaving John surviving, and at

the respective times of making her will and of her death, she had no other lands in Surrey than those above stated. On appeal, in the House of Lords, affirming the judgment of the Court of K. B., the opinion of the Judges was delivered by the Lord Chief Baron, as follows:

"There is no difference of opinion among the Judges. "The question which they have to consider in pursu- "ance of your Lordship's order is expressed in these "words: Whether, upon the facts stated in the special "verdict in this case, the will of Sarah (Scott) Trimmer "operated as an execution of the power of appointment "of that moiety of the tenements in Surrey of which "she was tenant for life, with power of appointment, "stated in the special verdict. We are of opinion that "this devise is not an execution of the authority "given to Sarah Trimmer by the settlement of 1850. "There are many cases upon this subject, and there "is hardly any case in which the principle appears to "have been stated with more uniformity or acted "upon with more consistency. They began with "Sir Edward Clere's case, in the reign of Queen Eliz- "abeth, and are continued down to the present time, "and I may now venture to say that, in no instance, has "a power or authority been considered as executed, un- "less by some reference to the power or authority, or "to the property which was the subject of it, when, un- "less the provision, made by the person entrusted with "the power, would have been entirely ineffectual, would "have nothing to operate upon, except it were consid- "ered as an execution of such power and authority. In "this case, there is no reference to the power, and there "is no reference to the subject of the power, and there "is sufficient estate to answer the devise without calling "in the undivided moiety now in question. All the "words are satisfied by the undivided moiety of which "she was the owner in fee. It is said that the present "is a question of intention, and so perhaps it is, but

" there are many cases of intention where the rules by " which the intention is to be ascertained are final and " settled. It would be extremely dangerous to depart " from these rules in favor of loose speculation respect- " ing intention in particular cases. It is therefore that " the wisest judges have thought proper to adhere to " the rules I have mentioned, in opposition to what " they have thought the proper intention, in the par- " ticular case before them."

As construing the words " my property and estate," " property I am now or may hereafter become possessed " to relate alone to testators' own property, particular attention is asked to the following cases:

Evans vs. Evans, 23 Beavan, 1:

On 1st of August, 1848, Emily Haigh, then Mrs. Evans, immediately before the birth of her first child, made a will in these words: "This is " my last will and testament regarding the disposal of the " property and income I am now or may become possessed " of" * * * " I will that in the event of my leav- " ing children, that my dear husband shall enjoy the " interest of my property during his lifetime, and that " at his death it be equally divided among my surviv- " ing children on their arriving of age, etc." Mrs. Evans died 13th December, 1854, leaving her husband and three children surviving. At the time of her death she had, in addition to a life estate subject to her power of appointment by will, only £93 arrears of income in the hands of the trustees and a contingent reversionary interest in some trust moneys.

The Master of the Rolls (Sir John Romilly):

" After consideration of the authorities which relate " to this subject, I have come reluctantly to the opin- " ion that the will of the testatrix did not operate as " an execution of the power contained either in the set- " tlement or in the will. In the first place, it is to be " observed that she disposed of the ' property and in-

" come I am now or may become possessed of.' The " funds or money which she had the power to dispose " of consisted of two classes; first, that which belonged " to her as her own property, and that which did not " belong to her as her own property, but over which she " had the power of disposition. This distinction be- " tween property and power, notwithstanding some at- " tempt to disturb it, is perfectly settled, and so must " be borne in mind in considering this case. In her will " she refers to property which she then possessed, " and to property which she might become possessed " of. She nowhere refers to property not be- " longing to her, but over which she had a " mere power of appointment. If there were nothing " to satisfy the previous words it might be urged that " the Court must decide that they operated as a good " execution of the power, because, unless they be held " to have reference to the power, there is nothing to " which they can refer; but in this case both the " branches of the settlement in this will are satisfied " when the facts are known. * * * 'These words em- " brace all her real and personal property, but if there " be property to satisfy these words, can they go be- " yond them and extend to dispose of what was not the " property of the testatrix, but over which she had only " a power of appointment? It is difficult to found any " part of the decision on the greater or smaller amount " of her property, whether it was £90 or £9,000. The " words are adapted to include everything that was, " and to exclude everything that was not, of her own " property.

* * * * * *

Jones vs. Curry, 1 Swanson's Repts., p. 66:

" The will of a person having a power to dispose of a fund consisting partly of real estate and partly of household furniture, linen and plate, containing a gift of ' all of my estate and effects of whatever denomina-

tion, and all my household furniture, with linen and plate,' is not an execution of the power. A bill filed by the legatees recited that exclusive of a debt of £100 which was considered as lost, testatrix did not at the time of her death possess any real or personal property except this property over which she had these powers of appointment. Parol evidence was introduced to same effect."

The Master of Rolls (Sir Thomas Plumer) :

" The first question is whether the Court can collect " on the face of the will, so far as respects personalty, " an intention in the testatrix to pass this property. I " say on the face of the will, because it is now clear that " the Court cannot look beyond the will. Whatever is " the inadequacy of a testator's property to satisfy the " terms of the will, and whatever may be the conviction " of the Court of his intention to execute the power, " the state of his personalty at the time of the will or " of the death cannot be examined for the purpose of " *collecting* evidence of his intention. * * * In the " present case, so far as respects personal property, it " is clear nothing on the face of the will denotes an in- " tention to dispose of this fund. The will purports to " pass the property of the testatrix in terms appropriate " for that purpose, without reference to the power, or " to anything which is the subject of it. On this in- " strument the judgment of the Court must be founded, " nor can I, consistently with the principles to which I " have adverted, receive the evidence that has been " offered of the insufficiency of the testratrix, personal " property to satisfy the purposes of her will. The " only remaining question (and but for that the case " would hardly be open to argument), is whether so far " as the real estate is concerned an intention to exercise " her power can be collected from the will and from the " extrinsic evidence, to which on the subject " of realty the Court is permitted to resort. On " that point there is a shade of novelty in this

" case; but, not withstanding an *anxiety* to support " the will, I should not feel justified in pronouncing a " judicial opinion that the testratrix *designed to* pass " this real property. The case of Standen vs. Standen " has established that with regard to real estate the " Court may examine whether the circumstances of the " testator's property are such as to give effect to the " will, and if this will had contained an unequivocal " devise of realty, the Court, under the authority of " that decision, must, in order to give operation to an " instrument which would otherwise be inoperative, " have resorted to the fund, the subject of the power. " But this will contains no words which will be without " operation unless referred to the power. On the con- " trary, the testratrix uses terms of generality, 'all my " estate and effects of whatever denomination.' That " clause would embrace all her real and personal prop- " erty; but would it go beyond that? Can it exend to " what is not the property of the testratrix? The words " are not a specific description of any estate, or any " species of interest, but adapted to comprehend every- " thing which was, and to exclude everything which " was not, a part of her property. In order to apply " them to property not hers, we must reject the pro- " noun 'my' and say that by the phrase 'my estate " and effects' she meant to give what was not her own. " That would be not to construe, but to contradict the " words of the will. The distinction, notwithstanding " some expressions of Lord Rosslyn, in Standen vs. " Standen, being now established between property " and power, these words containing no direct refer- " ence to any particular fund, nothing in the descrip- " tion to enable the Court to collect her intention to " exercise her power are not sufficient to designate with " due certainty property not her own, but of which she " was empowered to dispose. Though she had no real " estate, she might have personal property of various

"descriptions, and the terms would be satisfied by "passing that.

Such, likewise, is the tenor of the American decisions in which the common law rule is followed. The rule as laid down by Chancellor KENT is quoted, fortified and amplified by these decisions. We refer to two or three.

Bingham's Appeal, 64 Penn., 347:

AGNEW, J.:

"It may be admitted that the intention of the donee "of a power is the true criterion to determine its exe- "cution. But this intention must appear in the instru- "ment itself. In Pennsylvania the rule is that the in- "strument must refer to the power to be executed, or act- "ually dispose of the subject of it: Wetherel vs. Weth- "erel, 6 Harris, 265; Thompson vs. Garwood, 3 Whart., "287; Meconkey's Appeal, 1 Harris, 259: Keefer vs. "Schwartz, 11 Wright, 508; Commonwealth vs. Duf- "field, 2 Jones, 280; Heffernan vs. Adams, 7 Watts, "116. When the donee of a power refers to it, or "when he disposes of the subject of, it by such a de- "scription as identifies it, the intent to execute is free "from uncertainty. A third mode of ascertaining the "intention is, when the instrument of execution cannot "have any operation except on the ground that the "donee intended to execute his power, as where it is a "power to dispose of real estate and he has none of "his own. It is manifest the third mode is rather a "a legal presumption than a manifestation of intention "—a positive inference drawn from a negative fact. "But positive legal presumptions cannot judicially "arise upon equivocal or uncertain conditions of facts. "Hence, the mere fact that the bequests in a will exceed "the testator's estate cannot draw after it an in- "tention to execute the power. * * * It is "possible, but not certain, that he intended "an execution of the power. It must not be

" forgotten when handling such a question, that we are " dealing with the property of another, and not with " that of the donee of the power. In the donee it is " but a trust, and those interested in the estate of Wil- " liam Bingham have a right to know that the will of " their testator has been actually executed as he in- " tended by the donee of this power. Hence, they are " entitled to certainties, not mere conjectures or possi- " bilities. The New York case of White vs. Hicks, " 43 Barb., 64, is entitled to no weight here. Justice " SUTHERLAND admits that the English authorities, since " the revolution, are strongly against evidence of in- " tention, *dehors* the *instrument*, and states the law " (this is " will " in the decision), in regard to personal " property is, that you cannot look beyond the face of " the will for an intent to execute the power. The " question was one of evidence, and its character pe- " culiar; and, at the close of his opinion, he clearly " derives his conclusion from local and, in part, statu- " tory considerations in determining that the evidence " of the intrinsic fact was properly received."

An earlier case from Pennsylvania furnishes an admirable statement of the law governing this subject.

Witherel vs. Witherel, 18 Penn. St., 265 :

" But the rule of construction in this case, which " involves all others, is that the intention to execute " the power must be so clearly manifested in the act of " execution, that it is impossible to impute any other (Andrews vs. Emmott, 2 Brown's Ch. Rep., 297 ; Nowell vs. Roake, 2 Bingh., 497)."

Attention is called to the following very carefully considered case decided by the Court of Appeals of Maryland :

Patterson et al. vs. Wilson, 64 Maryland, 197 :

" Upon an inspection of the will of Mary L. Patter- " son, it at once becomes apparent that there is not the

" slightest reference made to the power created by the " wills antecedently by her parents. It has, however, " been decided that the donee of a power may execute " it without referring to it, and without taking any no- " tice of it, provided the intention to execute the power " really appears. Smith vs. Adkins, 41 L. J. Chanc., " 628 ; Doe dem.; Smith vs. Bird, 5 B. & Ad., 695 ; " Sugden on Powers, 373.

" But a person taking under the execution of a power " does not derive his title from the donee, but from the " donor under the authority of the instrument creating " the power. Bradish vs. Gibbs, 3 John. C. R., 523. If, " therefore, there is no express reference to the instru- " ment creating the power, it is apparent that there " should be some special reference to the subject on " which it is to operate, the same circumstances lead- " ing to the conclusion that its execution was intended. " Thus in Doe dem. Caldecott vs. Johnson, 7 Man. & " Gran., 1047, where it appeared that the testator, " holding property for life with a power to devise or " convey, had in general terms devised and bequeathed " all his real and personal estate, it was held that the " will was not a good execution of the power, because " it contained no reference to the power, or to the " property on which it was to operate, or to anything " from which it could be inferred that the testator in " framing the will had the power in his contemplation. " * * *

" It has long been the settled doctrine in England " that where the power is not referred to, the property " subject to its operation must be mentioned, so as to " indicate that the disposition was intended to effect it, or, " in other words, the donee must do such an act as to " show that he has in view the thing of which he has the " power to dispose. When the question has arisen in " the construction of wills, it seems to have been for- " merly settled that a mere general devise or bequest, " however unlimited in terms, will not comprehend the

" subject of the power, unless it refer to the subject or " to the power itself, or unless an intention to execute " it becomes apparent from circumstances tending to " such a conclusion. Lowson vs. Lowson, 3 Bro. C. C., " 272; Moulton vs. Hutchinson, 1 Atk., 558; Hales vs. " Morgeman, 3 Ves., Jr., 299. * * *

" In recognition of this doctrine, Chancellor Kent " says that, ' in case of wills, it has been repeatedly de- " clared, and is now the settled rule, that in respect to " the execution of a power, there must be a reference to " the subject of it, or to the power itself, unless it be in a " case in which the will would be inoperative without the " aid of the power, and the intention to execute the pow- " er became clear and manifest.' 4 Kent Comm., marg. " 334.

" This Court has recognized and adopted the rule " as settled in England and as so clearly and concisely " stated by the eminent jurist just mentioned. Morey, " Ex'x of Michael, vs. Michael, 18 Md., 241; Md. Mut. " Ben't Society of Red Men vs. Clendimer, Admr., &c., " 44 Md., 429; Foos vs. Scarf et al., 55 Md., 309.

See likewise

Pease vs. Pilot Knob Iron Co., 49 Mo., 124.

This is the doctrine laid down by this Court.

Blake vs. Hawkins, 98 U. S., 315:

" Whether this will was an execution of the power re- " served to her by the deed to her son referred to " in the introductory clause—whether it was an ap- " pointment of so much of the sum of $50,000 " made subject to her appointment by the deed, as re- " mained undisposed of by her, is the most important " question we have now to consider. It must be ad- " mitted that the avowal by the testatrix in the intro- " ductory clause of her will of her purpose thereby to " execute the power was not itself an execution. It is " important only as it may shed light upon the subse-

" quent dispositions. A previously expressed intention
" may serve to explain language afterwards used, and
" show what its meaning is ; but it is one thing to in-
" tend a future act, and quite another to carry out that
" intention. While it is true that whether a power has
" been executed or not it is a question involving a con-
" sideration of the intent of donee of the power, it is
" equally true that the intention must be found in the
" acts or dispositions of the donee, and not alone in
" any previously expressed purpose. Prior to the Eng-
" glish Statute of Wills (1 Vict., c. 26), which, so far as
" it relates to appointments by will, has been enacted
" in North Carolina, certain things had been generally
" accepted as indicative of an intention to execute a
" power, and as sufficient indications. As expressed in
" repeated decisions, these were : First, some reference
" to the power in the will or other instrument ; second,
" some reference to the power or subject over which
" the power extends ; and third, where the provisions
" of the will or other instrument executed by the donee
" of the power would be ineffectual or a mere nullity,
" or would have no operation, if not an execution of the
" power. The first of these indications, however, must
" be understood as a reference to the power in the
" dispositions actually made. In Lowson vs. Lowson
" (3 Bro. C. C., 272), a will expressed to have been
" made in pursuance of a power which the testator had,
" was held by the Lord Chancellor not to have been an
" execution thereof, because the subsequent disposi-
" tions were apparently applicable only to his own
" estate. It may be remarked that Sir Edward Sugden
" expresses doubts of the correctness of this decision,
" for the reason given by Lord Thurlow ; but he still
" lays down the rule, that ' although a will be expressed
" to be made in pursuance of the power, yet if the tes-
" tator appears to dispose of his own property only, the
" the power will not be executed by the will ' (Sugden
" Powers, 2d Am. Ed., 374). On the other hand, if the

" will contains no expressed intent to exert the power, " yet if it may reasonably be gathered from the gifts " and directions made that their purpose and object " were to execute it, the will must be regarded as an ex- " ecution. After all, an appointment under a power is " an intent to appoint carried out, and if made by will, " the intent and its execution are to be sought for " through the whole instrument."

It is very significantly remarked that in several of the cases that the person exercising a power is not in the position of one disposing of her own, but a special agent dealing with the property of another, and disturbing often the testamentary dispositions the owner has made.

It is a familiar rule that a special agency shall be strictly pursued, and the reasons which plead for liberal construction in favor of testators have no place in considering the question of the execution of a power of appointment.

Summary.

Testing this case by the rules of law above laid down, we find the following :

1st. That Mrs. Clemson received under the will of Mrs. Calhoun legacies for herself and a power to appoint over an estate bequeathed to another.

2d. That her estate, and that of her trustee, were only for her own life, and that she referred to that life estate so held by her trustee as her legacy.

3d. That in executing her will she referred to the legacies to which she held title under her mother's will, classing them with the rest of her property, and making no allusion to the power which she held, or the estate upon which that power was to operate.

4th. That she invoked only the testamentary power which she held over her own effects, and by implication expressly declined to exercise the power of appointment vested in her over the estate of another.

5th. That she bequeathed only the property and estate to which she was entitled or which she might thereafter acquire, dealing solely with her own effects and her own property, as to which she might otherwise die intestate.

6th. That she further described that property as "my property and estate," clearly evidencing her intention to deal alone with that which she possessed.

7th. That she nowhere refers to the estate which was vested in her daughter Floride Clemson Lee, nor does she attempt to dispose of it.

8th. That she nowhere alludes to the power which she had to appoint to it, but expressly invokes only that testamentary power by which she could dispose of the distributive shares which she owned in her brothers' and sisters' estates.

9th. That her legacies under Mrs. Clemson's will were valuable and presented an accumulation which would satisfy the reference made in the preamble.

10th. That even if this were not so, she only undertook to bequeath her own property and estate, and she had a property and estate which amply satisfies the words of her will.

11th. That her will, therefore, did not execute the power of appointment permitted to her over the estate vested in Floride Clemson Lee, but only disposed of her own estate; that its true construction forbids any

other interpretation, and that any other would substitute another intent for the intent to be legally gathered from testatrix's will.

VI. Jurisdiction.

It is claimed that equity has no jurisdiction in this case and that the bill should be dismissed for want of jurisdiction. The learned District Judge who granted the preliminary injunction decided differently. He held that by the purchase under the Master's sale, Clemson acquired the fee in this property, in trust for his wife, and upon the further trust to hold, subject to the limitations of the last will and testament of Mrs. Calhoun. That this deed being confirmed by the Court the legal title was therefore put in Clemson and passed to the present defendant as his devisee, and that equity therefore had jurisdiction. He also held that the fact that the State of South Carolina could not be sued, and that if the will of Clemson was carried into effect and the title conveyed to the State, complainant would be rendered remediless in any civil action, gave equity jurisdiction (Transcript, p. 35). This ruling was affirmed by the Chief Justice and the Circuit Judge sitting in the Circuit Court (Transcript, p. 45).

This case is wholly unlike cases where a complainant has been admittedly at one time in possession of the fee, and has been attempted to be dispossessed under some unconstitutional law by the agents of a State purporting to act under such unconstitutional law. In such case the act of the agent is the act of an individual, and not the act of the State. But in this case the question is purely one of title, arising upon the validity of the title claimed by R. W. Simpson, who is in possession. The State's title depends upon his deed and a law enacted by her Legislature accepting this bequest, which law will not be unconstitutional, nor the acts there-

under illegal, provided the title to this property rested in Thos. G. Clemson at the time of his death. Hence, any suit against the agent of the State would be a suit against the State herself, as her agents, so far as they acted, would be acting under an authority entirely lawful, and the whole question would not be of illegality in the action of the State, but whether or not the title under which the State claimed, rested in her grantor, or in another, and no such action could therefore be maintained against those she might put in possession.

Cunningham vs. Macon & Brunswick R. R., 109 *U. S.*, 446.

The suffering, therefore, of this deed to be made would be an irreparable injury which cannot be remedied, if the injunction be revoked, and therefore equity had authority to grant this relief.

U. S. vs. Duluth, 1 Dill. 469 (*Mr. Justice Miller*).

But equity had jurisdiction in this case, *quia temet*, to prevent a cloud upon the title by the execution of the deed from Simpson to the State. It is true that, as a general rule, equity will not entertain a bill to prevent a cloud upon the title where the party is not in possession, but to this rule there are many and well-defined exceptions. Says Mr. Pomeroy in his valuable work on Equity Jurisprudence, Section 1399, note.

" As to whether possession by a plaintiff is necessary " before he can resort to equity to remove a cloud, " there appears to be some conflict of opinion, arising " from loose and careless statements of judges and an " overlooking of the principles of equity in regard to " the exercise of its jurisdiction. When the estate or " interest to be protected is equitable, the jurisdiction " could be exercised whether the plaintiff is in or out " of possession, for under these circumstances legal " remedies are not possible ; but when the estate or in-

" terest is legal in its nature, the exercise of the juris-
" diction depends upon the adequacy of the legal rem-
" edies ; thus, for example, a plaintiff out of possession
" holding the legal title will be left to his remedy by
" ejectment under ordinary circumstances (citing au-
" thorities) ; but where he is in possession, and thus
" unable to obtain any adequate legal relief, he can resort
" to equity (citing authorities). Where there is a party
" out of possession he and has an equitable title, or
" where he holds the legal title under circumstances
" that the law cannot furnish him full and complete re-
" lief, his resort to equity to have a cloud removed
" ought not to be questioned. *Redmond vs. Packenham,*
" *66 Ill., 434 ; Plant vs. Barclay, 56 Ala., 561 ; Thomp-*
" *son vs. Lynch, 29 Cal., 189 ; Hager vs. Shindler, 29*
" *Id., 47 ; Kennedy vs. Northup, 15 Ill., 148, 152 ;*
" *Branch vs. Mitchell, 24 Ark., 431, 439 ; King vs.*
" *Carpenter, 37 Mich., 363 ; Ormsby vs. Barr, 22 Id.,*
" *80, 84 ; Low vs. Staples, 2 Nev., 209, 212 ; Pier vs.*
" *Pond du Lac, 38 Wis., 470 ; Lawrence vs. Zimpleman,*
" *37 Ark., 643, 645 ; Booth vs. Wiley, 102 Ill., 84,*
" *114.*"

It may be noted that the Courts of Alabama and Arkansas, above cited, have laid down as the general rule the proposition that the party holding the legal title out of possession will be left to his remedy by ejectment, but yet recognize in the above cases that the inadequacy of the relief at law furnishes good reason for the resort to equity.

Attention is also called in this connection to the case of Lamb vs. Farrell, 21 Fed. R., page 5. This case contains a full and accurate discussion of the principles governing this question. The learned Judge says, *inter alia*, the following (after citing Pom. Eq. Jur., *supra*) :

" ' The principle on which the jurisdiction is founded
" ' and the rule for its exercise are admirably stated in
" ' Martin vs. Graves, 5 Allen, 601, where the Court
" ' say :

" ' Whenever a deed or other instrument exists, which
" ' may be vexatiously or injuriously used against a
" ' party after the evidence to impeach or invalidate
" ' it is lost, or which may throw a cloud of sus-
" ' picion over his title or interest, and he cannot imme-
" ' diately protect or maintain his rights by any course
" ' of proceeding at law, a court of equity will afford re-
" ' lief by directing the instruments to be delivered up
" ' and canceled, or by making any other decree which
" ' justice and the rights of the parties may require."

" In Clouston vs. Shearer, 99 Mass., 209, it is said:

" ' This is a broad and comprehensive statement of
" ' the principles on which such relief is granted.' "

" And the latter case is cited, approvingly in Sullivan
" vs. Finnean, 101, Mass., 447, and the rule applied
" where the plaintiff and defendant were occupying
" different rooms in the same house, each claiming to
" own the whole; and see *Loring vs. Downer*, 1 *Mc-*
" *All*, 360. *Bunce vs. Gallagher*, 5 *Blatchf*,, 481.
" *S. C.* 7, *Amer. Law Reg.* (*N. S.*) 35. *Young vs. Por-*
" *ter*, 3 *Woods*, 342. *Carrol vs. Safford*, 441, 464.

" * * * * * *

" A short sentence in the opinion of the Court in the
" case of *Orton vs. Smith*, 18 How, 263, is cited as sup-
" porting the proposition that equity has no jurisdic-
" tion to remove a cloud from title, except at the suit
" of one who holds the legal and equitable title and
" the possession. The case is cited in support of this
" proposition by counsel, and in the late case of *Patrick*
" *vs. Isenhart*, 20 Fed. Rep., 339, and other cases. This
" is a total misconception of what was before the Court
" in that case for decision, and what was actually de-
" cided."

* * * * * * *

" The manifest sense of the opinion when read in the
" light of these facts, is that there was such a want of
" consideration, conscience and good faith in the ac-
" quisition of Smith's title, that a court of equity would

" not lend him its aid against a *bona fide* purchaser, for " value, of an equitable title. The question of posses- " sion was not mooted. The word occurs but once in " the opinion, and then casually. There was no fact " or issue in the case making it necessary or proper to " decide whether the jurisdiction in equity, inde- " pendently of any statute, to remove a cloud from " titles, is restricted to those only who have a clear, " legal and equitable right, and actual possession of " land. This is made clear by the fact, that the Court " in enumerating the defects and weaknesses in the " plaintiff's case, does not mention want of possession " as one of them. On the facts of the case the Court " refused to treat the plaintiff as the *bona fide* owner of " the legal or equitable title."

There is another ground upon which the jurisdiction of equity can be invoked in this case. Isabella Lee is an infant. R. W. Simpson, if her contention be correct, has intruded upon this property, and is now collecting the rents, issues and profits. This gives jurisdiction to a court of equity. An infant may, by his *prochein ami* call his guardian to account, even in his minority. If a stranger enter and receive the profits of an infant's estate, he shall, in the consideration of the Court, be looked upon as a trustee, and a like relief may be granted against him.

Cury vs. Bertie, 1st P. Wms., 342.

" Thus, for instance, if a stranger intrudes upon an " infant's lands and takes the profits, he is compellable " to account for them, and will be treated as a guardian " or trustee for the infant; for so greatly does the law " favor infants, that if a stranger enters into and occupies " an infant's lands, he is compellable at law to render " an account of the rents and profits, and will be " chargeable as guardian or bailiff."

Story, Eq. Jur., Sec. 511.
6 Ves., 89.

3 DeG., M. G., 782.
27 Beav., 508.
2 I. R. Eq., 414.

An infant may proceed on a legal title for account, and a Court having taken jurisdiction for one purpose, can try the title.

Lewin on Trusts, 8th Ed. (Flint's Notes), pp. 890, 891.
3 Atk., 336.
McClellan, 541.
2 Sim. and Stu., 206.

In the case of a bill brought against a stranger in possession, claiming under adverse title, it was held that an infant is entitled to treat a person, who enters on his estate during his infancy, as his bailiff, who is accountable as such. The Court has jurisdiction to decree an account of estates of infants against persons entering during their minority. It is not taken away by the fact that at the time when the bill was filed the infant had attained twenty-one.

Injunction granted, though not prayed, to restrain defendant, setting up an outstanding estate. Bill retained, while plaintiff brought ejectment.

Bloomfield vs. Eyre, 8 Beav., 253-9.
3 Atk., 130, 544.
1 Atk., 489.

To oust the jurisdiction of equity " it is not enough " that there is a remedy at law. It must be complete " and adequate, or in other words as practical and as " efficient, to the ends of justice, and its prompt admin- " istration, as the remedy in equity."

Boyce vs. Grundy, 3 Pet., 215.

There may be a legal remedy, but yet if a more complete remedy may be had in Chancery, it is a sufficient ground for jurisdiction.

Wyly vs. Cox, 15 How., 420.
1st Pom. Eq. Jur., Sections 181, 231, 234.
15 Wallace, 211.

The bill was certainly necessary, and should be retained for the injunction sought.

Horsberg vs. Baker, 1 Pet., 233.

Therefore, for all above reasons, complainants insist that the Circuit Court decreed erroneously in not holding that complainant was entitled to recover the Fort Hill place, and that it erred in holding that Mrs. Clemson's will was an execution of the power of appointment which she held under the will of Mrs. Calhoun, and complainant insists that Equity has jurisdiction of this cause.

ALEX. C. KING,
Of Counsel for Appellant.

CALHOUN, KING & SPALDING,
Solicitors.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1418.

ISABELLA LEE, by her next friend, GIDEON LEE, Appellant,

vs.

RICHARD W. SIMPSON, Appellee.

BRIEF

Of LeRoy F. Youmans, Counsel for Appellant. Filed Under Order of March 17, 1890, in Reply to the Briefs Filed by Counsel for Appellee that Day.

Charles A. Calvo, Jr., Printer and Bookbinder, Columbia, S. C.

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3

In support of the Circuit decrees dismissing the Bill, on the ground that the last will and testament of Mrs. Anna C. Clemson was a due execution of the power of appointment vested in her by the will and codicil of her mother, Mrs. Floride Calhoun, the counsel for Appellee endeavor in their Briefs filed to establish these propositions:

I. That Mrs. Clemson's will contains sufficient reference to the power. 4

II. That it contains sufficient reference to the property.

III. That, exclusive of her distributive shares in the estates of her brother and sister, there was and could be no other property than that over which the power of appointment existed, which Mrs. Clemson's will referred to and disposed of.

IV. That it contains an intention to execute the

5 power so apparent and clear that the transaction is not fairly susceptible of any other interpretation.

V. That it contains such intention carried out.

Mrs. Clemson's will is as follows:

"STATE OF SOUTH CAROLINA:

"In the name of God: Amen!

"Whereas I am entitled to legacies under the last will of my deceased mother, Floride Calhoun, and to a distributive share in the several estates of my deceased
6 sister, Cornelia Calhoun, and my brother, Patrick Calhoun, and, notwithstanding my coverture, have full testamentary power to dispose of the same:

"Now I, Anna Calhoun Clemson, the wife of Thomas G. Clemson, of the town of Pendleton, in the County of Anderson, and State aforesaid, being of sound and disposing mind, memory and understanding, do make this my last will and testament, in manner following:

"I will, devise and bequeath the entire property and
7 estate to which I am now in any wise entitled, and which I may hereafter acquire, of whatever the same may consist, to my beloved husband, Thomas G. Clemson, absolutely and in fee simple. But should my husband, Thomas G. Clemson, depart this life leaving me his survivor, or should he survive me and then die intestate, in either event I will, devise and bequeath my entire property and estate, as well as that which I may hereafter acquire, of whatever the same may consist, to my granddaughter, Isabella Lee, the child of Gideon
8 Lee, of the State of New York, absolutely and in fee simple. I hereby nominate and constitute Thomas G. Clemson executor of this my will.

"In testimony whereof, I have hereunto fixed my signature, and put my seal, this twenty-ninth day of September, in the year of our Lord one thousand eight hundred and seventy-one, and in the ninety-sixth of the sovereignty and independence of the United States of America.

"ANNA C. CLEMSON. [L. S.]

"Signed, sealed and published as and for her last 9
will and testament, by Anna Calhoun Clemson, in presence of us, who, in her presence, subscribe our names as witnesses to the due execution thereof.

"AMELIA NIECIESKA PINKIND,
"E. B. CALHOUN,
"T. G. PICKENS, JR.

"I desire my dear husband, T. G. Clemson, to leave at his death, should he survive me, $500 to Maria Elizabeth Venning, in token of our appreciation of her de- 10
votion and fidelity; or should I survive him, I hereby desire the said sum should be paid her by my estate.

"ANNA C. CLEMSON."

As the answers to the Appellee's arguments, from the nature of the case, necessarily to a certain extent run into and interlap with each other, and as a proper answer to the arguments as presented in favor of any one of the first three propositions is necessarily to some extent an answer to the other two, it will be 11
essayed to answer together under one general head (particularizing when need be) the first three propositions, to wit:

I. That Mrs. Clemson's will contains sufficient reference to the power.

II. That it contains sufficient reference to the property.

III. That, exclusive of her distributive shares in the 12
estates of her brother and sister, there was and could be no other property than that over which the power of appointment existed, which Mrs. Clemson's will referred to and disposed of.

Appellee says the references to the power of appointment are in the preamble of Mrs. Clemson's will, and the references to property over which the power of appointment existed are both in the preamble and the disposing clauses.

13 The preamble is: "Whereas I am entitled to legacies "under the last will of my deceased mother, Floride "Calhoun, and to a distributive share in the several "estates of my deceased sister, Cornelia Calhoun, and "my brother, Patrick Calhoun, and, notwithstanding my "coverture, have full testamentary power to dispose of "the same." The first most natural thing to be done, in the effort to elucidate the meaning of the preamble, is to get a clear understanding of what the words "*I am entitled to*" mean. Webster defines
14 "*entitle*," "to give a title to," "to give a claim to." Worcester, "to give a right or claim to." Stormont, "to give a claim to," "to give a right to demand." Laurence & Rapalje Law Dictionary, "in its usual sense, to entitle is to give a right;" therefore a person is said to be entitled to property when he has a right to it. The legal decisions sustain the definitions of the lexicographers: *Umbers* vs. *Jaggard*, 9 Law Repts. Eq. Cases, 200. *In re Clinton's Trust*, 13 *id.*, 305; *Churchill* vs. *Denny*, 20 *id.*, 536; *Wilton* vs. *Colvin*,
15 3 Drew, 617, 626. The argument of Messrs. Smythe & Lee, p. 18, fol. 71, adds another feature: that the thing as to which it is said one is entitled is something not yet reduced to possession, so that when Mrs. Clemson said: "Whereas I am entitled to," she says: "Whereas I have a right, a right to demand certain "things not yet reduced into my possession." To what was she entitled? "Legacies under the last will of her deceased mother, Floride Calhoun, and a distributive
16 share in the several estates of her deceased sister, Cornelia Calhoun, and her brother, Patrick Calhoun." The second most natural thing to be done, in the effort to elucidate the meaning of the preamble, is to get a clear understanding of what the words "legacies under the last will of my deceased "mother, Floride Calhoun," mean. The key, and the only key, which will fit the locks of this ward is the will of Mrs. Floride Calhoun, which entitles Mrs. Clemson to the following legacies:

1. An oil portrait of Mrs. Calhoun's mother, the 17
maternal grandmother of Mrs. Clemson,—an absolute gift with no limitations, and subject to no contingencies. —*Codicil*, *par.* 2.

2. Certain furniture, jewelry, silver cups and other articles of personalty for life, and after her death to her daughter Floride absolutely.—*Codicil*, *par.* 2.

3. A beneficial interest as *cestui que trust* for her life for her sole and separate use in—

a. Three-fourths of the bond and mortgage debt 18
owed by Andrew P. Calhoun.—*Will*, *par.* 20; *Codicil*, *par.* 2.

b. One-third of the residuary estate left after payment of debts.—*Codicil*, *par.* 7.

c. The remaining two-thirds of the residuary estate left after payment of debts, if her grandsons should die under age and without issue.—*Codicil*, *par.* 8.

These are all the legacies to which Mrs. Clemson was entitled. Of the foregoing items of property, *a*, *b*, 19
c, of *No. 3*, the *legal* estate *pur autrevie* for the life of Mrs. Clemson was given to Edward Noble, Trustee; and after the termination of the beneficial interest of Mrs. Clemson by her death, they were given in remainder to her granddaughter, Floride, whose estate was defeasible on the happening of either of two contingencies: one, her death without leaving issue; the other, the execution of a power of appointment by Mrs. Clemson over these items *a*, *b*, *c* of subdivision 3, by a last will and testament duly executed by her, dispos- 20
ing of them. There can be no contest as to the correctness of this scheduling of the legacies to which Mrs. Clemson was entitled under Mrs. Calhoun's will. The statement in Messrs. Smythe & Lee's argument, (page 7, fol. 24,) that the legacy above mentioned as 2, and in their scheduling of the same as 3, (p. 6, fol. 24,) was given to Edward Noble in trust for Mrs. Clemson during her life, with power to dispose of by her last will and testament, is an obvious misapprehension.

21 It is necessary also to recite the following provision of Mrs. Calhoun's will in regard to *a* of above subdivision 3, the concluding sentence of paragraph 4 of the codicil:

"Should I at any time collect the aforesaid bond and mortgage debt, or any part of it, or should Fort Hill be purchased with it, or the money be invested in any other property, or be retained in hand, the property thus purchased, the property thus obtained by investment and the money thus retained shall be considered
22 and held to be in the place of, and the same as, the aforesaid bond and mortgage, and shall pass under this codicil as if the same were still in the form of said bond and mortgage: *that is to say, shall pass to my daughter Anna and granddaughter Floride, as aforesaid bond and mortgage debt is directed to be divided between them.*"

N. B. These *very important* words just above italicized are omitted by Messrs. Orr & Wells in their Argument, page 4, Statement of Facts, and again at page 7,
23 Points and Authorities; and by Messrs. Smythe & Lee at page 8, first two lines, and again at page 37, fol. 145, of their Argument.

Having thus ascertained what the legacies under the last will of Mrs. Calhoun to which Mrs. Clemson was entitled were, and there being no contention as to the distributive shares to which she was entitled absolutely in the several estates of her deceased sister, Cornelia Calhoun, and her brother, Patrick Calhoun, the third most natural thing to be done in the effort to elucidate
24 the meaning of the preamble of Mrs. Clemson's will is to get a clear understanding of what the words "and (whereas I,) notwithstanding my coverture, have full testamentary power to dispose of the same," mean. The words "the same" can obviously mean nothing more or less than the items of property to which she has just said she is entitled, has a right to, a right to demand as her own. In no possible view which can be taken, can the words "the same" be extended to include anything else. But the questions pertinent to the issue

raised, as it strikes us, by the arguments for Appellee are: What are the disabilities attendant upon coverture, which attached to Mrs. Clemson as a married woman, inhibiting the exercise of full testamentary power to dispose of the property to which she was entitled? Whence comes from? What gives her? the full testamentary power—which removes the disabilities attendant upon her coverture, and which enables her to dispose of the property to which she is entitled—which power she asserts that she has? And what is that full testamentary power?

The Appellee contends, as we understand the arguments filed in his behalf, that "the full testamentary power which Mrs. Clemson asserts that she has to dispose of the property to which she is entitled" is the power of appointment conferred by Mrs. Calhoun's will; that her full testamentary power comes from Mrs. Calhoun's will, and from Mrs. Calhoun's will alone, and that the disabilities attendant upon her as a married woman, *i. e.*, upon coveture, which full testamentary power removes, are the disabilities which the conference of the power by Mrs. Calhoun's will upon her removed. We understand Appellee's position in support of Proposition I: "That Mrs. Clemson's will contains sufficient reference to the power" to be that the will of Mrs. Calhoun is the only source of the "full testamentary power" which Mrs. Clemson asserts that she possesses, and that in this assertion she must have referred to the power given in the will, or else the words "notwithstanding my coverture, have full testamentary power to dispose of the same, would be meaningless and absurd."—Wells & Orr's argument page 9. "Can have no meaning otherwise."—Smythe & Lee's argument, p. 16, fol. 61, last line. "That the reference is express and direct."—Smythe & Lee's argument, p. 38, first two lines. And Appellee's position further to be that "testamentary power" means "a power bequeathed or given by a will."—Wells & Orr's argument, p. 21, lines 17, 18. Whereas we contend that the

29 disabilities attendant upon coverture in the matter of making a will, are disabilities which prevent a *feme-covert* from making a will of property to which she is entitled, *her own* property, and do not prevent her from executing a power of appointment over other people's property, by deed, by will, or in any other mode prescribed by the donor of the power in the instrument conferring the power. Kent says in his Commentaries, Vol. IV, P. 325: "A *feme-covert* may execute any kind of power, whether simply collateral,
30 appendant or in gross, and it is immaterial whether it was given to her while sole or married." In the Note *e* to this in the 4th edition, 1845, printed for the author, Kent himself cites Sugden on Powers, 148, 155; *Thompson* v. *Murray*, 2 Hill (So Ca.) Ch Rep., 214, and says: "I have deemed it sufficient on this particular subject to refer to Sugden's authoritative work for principles that are clearly settled without overloading the pages with references to the adjudicated cases. Sugden cites upwards of fifty cases to the
31 point of the general competency of a *feme-covert* and the limited capacity of an infant to execute a power." Lord Selborne says: "If the married woman had a power, the rules, as I understand the matter, applicable to a will purporting to deal with property by virtue of a power, were the same in the case of a married woman as in the case of an unmarried woman; *so that the whole doctrine of disability by coverture was entirely eliminated from questions liable to arise as to the wills*
32 *of married women, so far as the wills operated under powers.*" "Such writing by a married woman, though testamentary in form, is not strictly a will, but an *appointment* under the name or in the nature of a will."—2 Kent, 170; *Barnes* v. *Irwin*, 2 Dall., 199, 202. "*There is this material practical difference between a will and an appointment by will: that a married woman may make an appointment by will by the common law, but cannot make a will except as authorized by recent statutes.* The theoretical distinction is: that

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a will concerns the estate of the testator, and an ap- 33
pointment, under a power, that of the donor of the power."—*Osgood* v. *Martin*, 141 Mass., 474–7.

What is a will? "A will is defined to be the declaration of a man's mind as to the manner in which he would have *his* property or estate disposed of after his death." This definition, given by Judge David Johnson in 1828 in *Tomkins* v. *Tomkins*, 1 Bailey, (So. Ca.) 96, is adopted by Jarman, and forms the initial sentence of his treatise on wills. *His* property or estate, not another's. What is power? "That which enables 34
a person to do something which he could not otherwise do."—Rapalje & Lawrence Law Dict. "Testamentary power" is "the power of making a valid will."—Lawrence & Rapalje Law Dict.

What is "full testamentary power"? It is the full, complete power of making a valid will—of making a valid declaration of one's mind as to the manner in which one would have one's own property—the property which he owned, and that to which he was entitled, and that which he might thereafter acquire, of whatever 35
the same may consist, disposed of after his death." It can be conferred by no individual; it springs from the law, and from the law alone. So that it is clear on the one hand that no disability *attendant upon coverture* inhibited a *feme-covert* from becoming the depositary of a power of appointment over the property of the donor of the power, or from executing that power in the mode prescribed in the instrument conferring the power, whether by will, deed or otherwise; and it is equally 36
clear on the other hand that the donor of the power in directing in the instrument conferring the power, that the donee of the power should exercise the power of appointment over the donor's property, by last will and testament did not confer on her "full testamentary power," or indeed any "testamentary power" whatever, that is, any power to make a *valid will*. What relieved the testamentary disability attendant upon Mrs. Clemson's coverture and upon the coverture of

every other married woman in South Carolina? What gave her, as it gave every other married woman in South Carolina, "full testamentary power, notwithstanding her coverture, to dispose of," to make a valid will, of all the property to which she was entitled at the time of the execution of her will and which she might afterwards acquire? The answer stares the inquirer in the face: Section 8 of Article 14 of the Constitution of the State of South Carolina of 1868: "The real and personal property of a woman, held at the time of her marriage, or 'that which she may thereafter acquire,' either by gift, grant, inheritance, devise or otherwise, shall not be subject to levy and sale for her husband's debts, but shall be held as her separate property, and may be bequeathed, devised or alienated by her the same as if she were unmarried: *Provided*, That no gift or grant from the husband to the wife shall be detrimental to the just claims of his creditors." And the second Section of "An Act to carry into effect the provisions of the Constitution, in relation to the rights of married women.": "SEC. 2. A married woman shall have power to bequeath, devise or convey her separate property in the same manner and to the same extent as if she were unmarried; and if dying intestate, her property shall descend in the same manner as the law now provides for the descent of the property of husbands, and all deeds, mortgages and legal instruments, of whatever kind, shall be executed by her in the same manner, and have the same legal force and effect, as if she were unmarried."—14 Stat., 325, January 27, 1870.

This is the source, and the only source, "*fons et origo*," of Mrs. Clemson's "full testamentary capacity to dispose of the property to which she was entitled." Could the reference have been stronger had the draughtsman of Mrs. Clemson's will inserted these provisions in the preamble of Mrs. Clemson's will? This is what makes it necessary to the correctness of Judge Johnson's and Mr. Jarman's definition as applied in this

State, the insertion of "or woman's" after "man's," of "or she" after "he," of "or her" after "his." That 41
a married woman before this constitutional and this legislative provision could execute a power of appointment over the property of the donor of the power in any mode prescribed by the donor in the instrument conferring the power, but did not have "full testamentary power," can be easily seen by reference to the prior Statutes and decisions: A. A. 1734, 3 St. So. Ca., 383; A. A. 1789, 5 St. So. Ca., 106; *Ward* v. *Glenn*, 9 Rich., 130; *Shaw* v. *Dawsey*, 1 McM., 248; *In re Sarah A. Nowell*, 2 McC., 453; *Wilson* v. *Gaines*, 9 42
Rich. Eq., 422; *Porcher* v. *Daniel*, 12 Rich. Eq., 353.

Sugden on Powers, Vol. 1, p. 232, says:

"It will be collected from the precedent in a preceding page:

"1st. That the deed executing the power should be expressed to be in exercise of it.

"2d. Of every other authority enabling the donee in that behalf. And,

"3d. That it should be shown in the body of the 43
deed that the formalities required to the execution of the power are complied with. Every well drawn deed of appointment embraces these three points: The *first* clearly evinces the intention of the person executing the power, which is particularly necessary where he has an interest as well as a power; the *second* guards against any misrecital of the deed creating the power, and in some cases has reached powers which have been understood to be extinguished; and the *third* affords internal evidence of the ceremonies having been com- 44
plied with. And, moreover, the attestation endorsed on a deed executing a power should always state precisely that the formalities were attended to."—1 Sugden on Powers, p. 232.

As learned a lawyer and as skillful a conveyancer as Mr. Burt, drafting for the daughter of his friend—the "Gamaliel at whose feet he was brought up" as he was wont to say—an instrument to be signed by her as a

solemn execution of a power which was to divest the
45 vested remainder of her sole living descendant, her infant granddaughter, would surely have used terms more appropriate than those found in Mrs. Clemson's will, to make her intention to effect that purpose, *so apparent and clear that the transaction cannot be fairly susceptible of any other interpretation.—Blagge* v. *Miles*, 1 Story's Reports, 446.

The position taken by Appellee, that "testamentary power" means "a power bequeathed or given by a will," and the position taken by Appellant, that it means
46 "power to make a will," are left, upon the simple statement of them, to stand upon their merits.

The next proper inquiry is, whether in the disposing portion of her will she refers to the property over which her mother's will had given her a power of appointment. The first sentence is in these words: "Now, I, Anna Calhoun Clemson, the wife of Thomas G. Clemson, of the town of Pendleton, in the County of Anderson, and State aforesaid, being of sound and
47 disposing mind, memory and understanding, do make this my last will and testament, in manner following: I will, devise and bequeath the entire property and estate to which I am now in any wise entitled, and which I may hereafter acquire, of whatever the same may consist, to my beloved husband, Thomas G. Clemson, absolutely and in fee simple." As to the argument founded upon the use of the words *disposing* mind, as having any reference to the power of appointment given by her mother's will, or the property over which
48 that power might be exercised, we think it scarcely necessary to say to the Court that it is one of those formal words so usual in a will that its absence would excite surprise, and we think the same disposition may be safely made of the words *dispose*, *bequeath*, *bequest* and *legacy*, wherever those words occur in any of the papers in the case, and of the arguments founded on their use. In regard to this sentence, it is said in the argument of Messrs Smythe & Lee, page 38, fol. 149, 150:

"Note several things. She does not use the pronoun 49
'my' property and estate, which has been objected to in so many cases as negativing the idea of disposing of the property of another. She says 'the entire property and estate to which I am in any wise entitled.' She generalizes property and estate, so as to include not only that which was her own, but also any other she was interested in or had any control over. 'In any wise,' whether in my own right or under my mother's will." We can very readily understand the reason why Appellee's counsel should seek to make a distinction between the 50
words "my property and estate" and the words "the entire property and estate to which I am in any wise entitled,"—the reason so naively given by them—to wit, that the use of the pronoun *my*, according to the decided cases, negatives the idea of disposing of the property of another. But no such distinction exists between the phrases. The real distinction which the testatrix evidently had in her mind is the distinction between *meum* and *tuum*. This distinction is the foundation of
the framework of the theory of government set forth 51
by her father at the very threshold of his "Disquisition on Government," on which alone, even if there were no other pedestal to support it, his admirers think his fame would rest secure. In truth, the distinction antedates the Ten Commandments, is as old as the moral law, and is the very foundation stone of morals. The words are only a generalization of the property to which she has just said in the preamble that she was entitled, and the word "entire" is naturally and properly put in to 52
cover any item of her property she may not have stated in the preamble. But thin as is this idea, it dissolves into absolutely empty air when we read what immediately follows this sentence in her will, to wit: "But should my husband, Thomas G. Clemson, depart this life leaving me his survivor, or should he survive me and then die intestate, in either event, I will, devise and bequeath '*my* entire property and estate, as well as that which I may hereafter acquire, of whatever the

53 same may consist,' to my granddaughter, Isabella Lee, the child of Gideon Lee, of the State of New York, absolutely." Here are the identical property and estate conveyed under that dreaded [illegible] *my*. Neither these words nor the words in the preamble, nor the words "which I may hereafter acquire, of whatever the same may consist," can by any possibility refer to or embrace the *corpus* of the property which was vested in remainder in her daughter Floride, to take effect in possession after Mrs. Clemson's death, because to that
54 *corpus* she was not in any wise entitled, and it was the one piece of property which she could never acquire, for between her and her acquisition of it stood her own grave. On page 20, fols. 77 to 80, of the argument of Messrs. Smythe Lee in opposition to the position of Appellant that Noble was only trustee for the beneficial life interest of Mrs. Clemson, it is said: 1. "That it is absurd to think of a person making a will of a life estate." We reply that where the estate of testatrix consists, besides her distributive shares in the estate of her intes-
55 tate kindred which she has not received, in large part of the interest due on a large debt, which interest she has not received, and which perhaps might not be received until after her death, it is not only not absurd, but exceedingly natural, for one having full testamentary power, to dispose by will of all this property to which she was entitled and might thereafter acquire. It is further said, 2, "That it is hardly supposable that when these papers were drawn any such nice distinc-
56 tion was drawn as to the term of the trustee; they were dealing with the property, not the tenure." As to the first of these papers, to wit, the paper by which Mrs. Clemson substituted Clemson for Noble as trustee, we rely upon the treatment thereof by Mr. King in his argument, pages 19 to 21, and this citation of authority:

"In general, the appointment of a trustee is for the protection of the rights of the married woman against the husband. We are to recollect that the object of the

donor is that the wife should receive the issues and profits into her own hands, and enjoy and dispose of them for her own livelihood or otherwise, as she might think proper. This object will almost certainly be defeated by constituting the husband trustee—he will be constantly tempted to use the authority and influence of a husband to assume the disposal of the income and induce his wife to acquiesce. Where the husband obtains possession of property given to the separate use of his wife, this Court makes him a trustee for the benefit of his wife, but he has never been constituted trustee for the purpose of enabling him to receive the property." 57 58

Roberson v. *Dart*, Dudley's Eq., 132.
Boykin v. *Ciples*, 2 Hill Ch., 200.

As to the second of these papers, in which Mrs. Clemson directs Mr. Noble to make certain purchases for her, we agree with the counsel for Appellee that she did not attempt to draw any nice distinctions, and as she speaks of her legacy under the will of her mother in her letter to her Trustee, who, as well as herself, was thoroughly cognizant of its provisions, we have no idea that she attempted to set up any theory of its construction, or her rights thereunder, different from what is patent on its face. 59

As to what is said in 3 and 4 of same argument, same page and folio, the counsel seem to forget that Clemson took title to himself as Trustee under the will of Mrs. Calhoun, June 10, 1875. (Transcript, page 8, fol. 11.) 60

As to Proposition III, which Appellee seeks to maintain, to wit: "That, exclusive of her distributive shares in the estates of her brother and sister, there was, and could be, no other property than that over which the power of appointment existed, which Mrs. Clemson's will referred to and disposed of," we refer to the argument of Mr. Carey, to the argument of Mr. King at page 25, and to the argument of

61 Mr. Youmans filed March 17, 1890, pages 5 and 6, fol. 19 to 23, as to Mrs. Clemson's own property realized out of what her will mentioned as her own. We would further say that Mrs. Clemson was entitled not only to the unpaid interest on the bond and mortgage debt of A. P. Calhoun up to the time of the sale of Fort Hill under foreclosure, and to the rent, income and profits of Fort Hill during the time when Clemson had possession of it for the mortgagee before foreclosure, these being applicable to the satisfaction of the interest on
62 the bond debt due her,—to the rent, income and profits of Fort Hill when it went into the possession of Clemson as Trustee after the foreclosure,—but also to the interest upon the balance of the mortgage debt which remained after deducting the amount credited on the mortgage for the purchase of Fort Hill under foreclosure up to the time of Mrs. Clemson's death. Nor does it make any difference (as regard must be had to the property bequeathed and devised, not to the amounts actually received by Clemson as her sole legatee and devisee,)
63 whether he got the property to which she was entitled at the time of the execution of her will in her lifetime or after her death. Nor does it matter whether it be true, as surmised on page 14, fol. 52, and page 21, fol. 82, of argument of Messrs. Smythe & Lee, that what Mrs. Clemson received of the property to which she was entitled was her annual support, and was consumed in living, or whether Mr. Clemson from his own ample means supported his wife, as all husbands by law are
64 obliged to do, or in fact what became of this magnificent income, to use the words of the sneering allusion in the argument of Messrs. Smythe & Lee where last cited. Nor does it matter, there being no claims of creditors of Clemson in question, whether a claim might or might not be successfully set up on the ground of paraphernalia or separate estate for Mrs. Clemson in the oil portrait of her grandmother or in her bronzes and articles of *vertu*, or whether his marital rights attached upon them by his reduction of them into possession.

The solution of these questions, dependent upon the "domestic interior" of Fort Hill, not in evidence, has nothing to do with the matters here in issue; suffice it, he got them either as husband or legatee, it matters not which. As to the quotation in the argument of Messrs. Smythe & Lee, (page 30, fol. 119,) from *Boyd* v. *Satterwhite*, 10 So. Ca., 52: "If the donee of a power either refer to the deed or describe the property over which he has a power of disposition, it is sufficient to prove the intention," it is sufficient to say that this is a paraphrase, or rather construction, of what is said in *Probert* v. *Morgan*, 1 Atk., 441, which is not borne out by the decision therein 65 66

As to Proposition IV, to wit: "That it contains an intention to execute the power so apparent and clear that the transaction is not fairly susceptible of any other interpretation." And Proposition V, to wit: "That it contains such intention carried out," which propositions Appellee seeks to maintain, the reply will be made together, under one general head.

In response to the interrogatories at page 20 of Argument of Messrs. Wells & Orr, "was it natural, was it reasonable, was it probable under these circumstances she would give him what she had? Would it not have been most unnatural, unreasonable and improbable that, under the circumstances, she should have done anything else?" 67

To this we answer, that she did give him all of what she had. The effort of our previous arguments has been to show that this is precisely what she did, and what it was natural for her to do; but we have not been able to see a single *scintilla* of law, fact or circumstance tending to show that she either gave or intended to give him anything of *another's* property, but only all of her own property, all of what *she herself* was entitled to; in fact the question was answered before it was seen in the conclusion of Mr. Youmans's argument, filed March 17, 1890: "What more natural," under the circumstances, "than that a wife, newly enfranchised 68

69 as to the testamentary disposition of her own estate, should exercise the power conferred by this recent organic law of the land in favor of her husband? What more unnatural than that she, under the guise of mention of her full testamentary capacity over her *own* estate, should destroy the vested inheritance of her infant granddaughter, the only human being in whose veins ran her blood, by an act, not of omission, but of voluntary and positive commission, over her own mother's property, diverting that mother's bounty from her
70 own blood to a stranger?" At page 39, fol. 154, of argument of Messrs. Smythe & Lee, it is said: "We submit that the intention is clearly made out by the will itself, when Mrs. Clemson expressly refers to the legacies left her under her mother's will and to her power of disposition over them. What did she intend by it? Either, 1. To execute the power so referred to over such legacies; or, 2. To recite the legacies and the power for the simple purpose of ignoring it."

To this we reply:

71 1. That whatever relevancy this idea may have had when it appeared in its original shape, *Boyd* v. *Satterwhite*, 10 So. Ca., 54, and however germane to the discussion there it may have been, we cannot see what aid this paraphrase of it can possibly give to the proposition in behalf of Appellee which it is cited to support. Can anything be more patent on the face of the preamble of Mrs. Clemson's will, than that the legacies under her mother's will to which she refers, and refers
72 expressly, are those to which she herself is entitled, and that, *ex vi termini*, she does not refer to the interest in remainder to which she was not entitled? Can anything be more patent on the face of the preamble of Mrs. Clemson's will, than that the power of disposition to which she refers, and refers expressly, is "*full testamentary power*" to dispose not only of the legacies to which she was entitled under her mother's will, but also of the distributive shares of the intestate estates of her deceased sister and brother? "*Full testamentary*

power," which could not be conferred upon her by her 73
mother, or any other individual, but was conferred upon her by the organic law and legislation of her own State, the only sources under our system of government from which such power could emanate.

We reply:

2. That no stronger exemplification of the doctrine *expressio unius est exclusio alterius* can be given than that the expression by her of her full testamentary power given by the *lex terræ* is thee xclusion of the special, limited, coarcted power of appointment given 74
by her mother's will.

We reply:

3. That the disposing clauses of her will show as plainly as words can show that she did exercise the full testamentary power to which she had referred, in the most ample manner she could, by disposing of her entire property and estate to which she was entitled and which she might thereafter acquire.

The Special Master, as he had not the power of ex- 75
cluding, was compelled to admit a vast mass of incompetent testimony offered by Appellee and objected to by Appellant, which a proper application of the maxim "*Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*," would have excluded. The chief object of this testimony (amid which appears, picturesque in its setting, though, like its setting, incompetent, a short specimen of the nervous English of Mr. Wm. Henry Trescot,) seems to be to show that Mr. and Mrs. Clemson were both enthused to a very high 76
degree of excitation with the desire to donate the Fort Hill plantation to the State of South Carolina for the establishment of an Agricultural College, and that for this purpose they made mutual wills in favor of each other. *Where this* will of Mr. Clemson is, or ever was, does not appear. Why, if Mrs. Clemson wished to make this donation to the State, she did not do so by exercising her power of appointment under her mother's will in favor of the State does not appear and is simply inex-

77 plicable. Her legal adviser, Mr. Burt, could have accomplished this purpose for her in a very few minutes by drafting a proper will executing her power of appointment, and at the same time gratifying her conjugal affection, by creating a life estate in the property for her husband prior to the ultimate fee vesting in possession in the State. Assuming that Mrs. Clemson was animated by such a desire, it is most plainly palpable, not only that she, by her last will and testament, did not execute the power of appointment over it, but by the same
78 made dispositions utterly and entirely irreconcilable with the idea that she intended by her will to execute her power of appointment over Fort Hill. Leaving out of the question, for the sake of argument, the absolute want of reference to either the power of appointment or to the property covered by the power of appointment—leaving out the absolute confinement of the property embraced in the disposing clauses of her will to her own individual property and estate,—there is
79 absolute proof in the clause of her will immediately preceding that in which she nominates her executor that her will was never intended by her to operate as the execution of her power of appointment over Fort Hill conferred by her mother's will. For that clause reads as follows: "Should my husband, Thomas G. Clemson, depart this life leaving me his survivor, or should he survive me and then die intestate, in either event, I will, devise and bequeath my entire property and estate, as well as that which I may hereafter acquire,
80 of whatever the same may consist, to [not the State of South Carolina, as she would most certainly have said if she intended her will to operate as an execution of her power of appointment over Fort Hill, but to] my granddaughter, Isabella Lee, the child of Gideon Lee, of the State of New York, absolutely and in fee simple." All the incompetent testimony in the world, oral and written, cannot weigh a feather's weight in the balance against this duly executed last will and testament in writing of Mrs. Clemson and this solemn declaration of

her intention made "In the name of God. Amen." 81
We see nothing in the case looking in the direction of Appellee's theory that Mrs. Clemson manifests anywhere in her will an intention thereby to execute her power of appointment, much less that she ever carried out such intention. As to the query put in the argument of Messrs. Smythe & Lee, in the second line, immediately above folio 155, page 39, we would reply that as sane a person as Lord Thurlow held in *Lawson* v. *Lawson*, 3 Bro. C. C., 272, that "a will expressed to have been made in pursuance of a power which the 82
testator had was not an execution thereof, because the subsequent dispositions were apparently applicable only to his own estate," and *semble* that Sugden in his work on Powers, 2d Am. Ed., 364, and the Supreme Court of the United States in *Blake* v. *Hawkins*, 98 U. S., 326, agree with him in opinion.

In the case of *Attorney General* v. *Wilkerson*, 2 Eq. L. R., 216, cited by Messrs. Smythe & Lee, fol. 134, page 34, not to speak of the severe criticism upon it in the last English work on Powers, Farwell, page 184, the 83
will could have no operation at all unless treated as an execution of the power.

We concur with the statement of Messrs. Smythe & Lee in their argument, (page 22, fol. 87,) that Mr Clemson was not unmindful of his granddaughter, and their view is confirmed by items 11 and 12 of the codicil to Mr. Clemson's will (pages 16 and 17, fol. 26, 27, of addition to transcript.)

As to what is said in the argument of Messrs. Wells & 84
Orr, (page 5, second paragraph,) as to sums paid by Mr. Clemson as Trustee, suffice it to say that this is an item in the accounting which has not yet been touched in the Court below.

In both the arguments filed for Appellee there are very elaborate efforts essaying to show that the property devised by Mrs. Calhoun and the property over which Mrs. Clemson's power of appointment was authorized are exclusively personalty. Messrs. Smythe &

85 Lee say (page 37, fol. 145, of their argument,) that by the fourth clause of her codicil Mrs. Calhoun stamps it as personalty. Messrs. Wells & Orr in their argument (page 3, last paragraph,) use still stronger language: that she thereby stamped this property *irrevocably* as personalty. The provision, which they both cite twice, they cite as follows: "Should I at any time collect the aforesaid bond and mortgage debt, or any part of it, or should Fort Hill be purchased with it, or the money be invested in any other property, or be retained in hand,
86 the property thus purchased, the property thus obtained by investment and the money thus retained shall be considered and held to be in place of and the same as the aforesaid bond and mortgage, and shall pass under this codicil as if the same were still in the form of said bond and mortgage." It is unnecessary to answer the arguments based upon these citations, for on both occasions when used in each argument they close as above, —in all four instances omitting the following clause,
87 which is the real key to and explanation of the portion quoted which precedes it: "*that is to say, shall pass to my daughter Anna and granddaughter Floride as aforesaid bond and mortgage debt is directed to be divided between them.*"

At least ever since January 1, A. D. 1872, when Thomas G. Clemson as Trustee became the purchaser of the Fort Hill plantation under the foreclosure proceedings, (addition to transcript, page 7, fol. 10,) $15,000.00 of this bond and mortgage debt has been
88 land, descendable and devisable as such, see Mr. Youmans's argument filed March 17, 1890, (page 3, fol. 10, 11). This does away with any need for discussion as to how far the decision in *Swift* v. *Tyson*, 16 Pet., 1, cited in argument of Messrs. Smythe & Lee, (page 36, fol. 144,) as to the effect of State decisions on questions of commercial law, extends to questions of personal property, for the question as to Fort Hill must be determined by the law of this State, where it is situate. See authorities cited in same argument of Mr. Youmans, pages 1, 2 and 3.

Attention is now called to the South Carolina au- 89
thorities which have been cited by Appellee, with the view possibly of impinging on *Bilderback* v. *Boyce*, 14 So. Ca., 528.

In Wells & Orr's argument for Appellee, pp. 8 and 16, the case of *Porcher* v. *Daniel*, 12 Rich. Eq, (So. Ca.,) 349, is cited as authority for the position that "where a married woman has the power under her settlement to dispose of her property as she sees fit, it is not necessary that in disposing of it she should refer to the power." The case itself says (12 Rich. Eq., 90
349,) that for a full understanding of it reference should be had to *Reid* v. *Lamar*, 1 Str. Eq., 27, which case, decided December, 1846, says (1 Str. Eq., 37): "If anything can be considered as settled, it is the settled law of the State of South Carolina that where property is given or settled to the separate use of a married woman she has no power to charge, encumber or dispose of it unless in so far as power to do so has been conferred on her by the instrument creating her estate, which power must be strictly pursued, 91
in contradiction to many English cases in which it has been held that she is a *feme sole* with respect to her separate property, and may charge or dispose of it as she pleases, unless in so far as she is expressly restricted by the instrument. This has been the settled law in South Carolina since the decision in *Ewing* v. *Smith*, 3 DeSaussure's Equity Rep., 417, A. D. 1811, and 1 Strob Eq., 42. It has sometimes been said in relation to our doctrine that a married woman is only 92
a *feme sole sub modo*, or to the extent that the settlement makes her so; yet these expressions are inaccurate. She can in no manner or respect be considered a *feme-sole*. A *feme-sole* disposes of or charges her property by her own act and according to her own will by her inherent power as owner. A *feme-covert* exercises a *delegated* authority and cannot exceed it. She is enabled to execute a power, as in some instances any third person, *feme-covert* or other, even those

93 having no interest in the property, might be enabled to execute it and bind her by their act." The above citation was quoted with approbation as adjudging the settled law of the State in *Mobley* v. *Mobley*, 14 Rich. Eq., 287, A. D. 1868.

Ewing vs. *Smith*, 3 Des., 456, says: "It is indeed true, as a general rule, that an absolute right of property gives an absolute right of disposition; but the rule is only applicable to persons of full legal capacity,
94 and it is strange that any English Judge should ever have lost sight of the common law so far as to apply it to a married woman." The citation made in Appellee's argument is from the head note of 12th Richardson's Equity Reports, (S C.) page 349, and is not quite full enough to give a correct idea of the head note, much less of the decision. The portion of the head note from which the extract is made is: "Where a married woman has power under her settlement to dispose of
95 her property as she sees fit, it is not necessary, *it seems*, that in disposing of it she should refer to the power. *Her only right to dispose of it being conferred by the power*, she must, *it seems*, be understood as having reference to the power whenever she makes disposition of it, either in whole or in part. The will in this case *disposing of the property* held to contain a sufficient reference to the power." It will be seen that the citation omits from the first sentence the words "*it seems*," and omits entirely the second and third sentences above
96 quoted. But how illusory an idea the contracted citation from the head note gives of the decision will be seen by reference to the case itself. By indenture tripartite, Jane McKinney, intended wife, William R. Reid, intended husband, and Harvey Wheat, made an antenuptial marriage contract, by which, *inter alia*, Reid agreed and contracted with Jane, through and by her agent, Wheat, to surrender to her the "*full and free disposal* of the property she then had in possession, consisting of negroes, stock of different kinds, household and kitchen furniture, together with all she had

then or might have any interest or claim, to wit: all 97
the increase that might hereafter arise therefrom, or in any wise from them proceed, and all choses in action, to have and to hold the sole discretion, guidance thereof."

After the decision in *Reid* v. *Lamar*, 1 Strob. Eq., 267, Jane, then Mrs. Reid, on April 29, 1857, executed this will: "In the name of God. Amen: I, Jane Reid, wife of William R. Reid, of the District of Abbeville, and State of South Carolina, but, notwithstanding my coverture, having the right and power to dispose by will of the property now in my use and possession, to 98
wit, (a careful schedule made) * * * being of sound and *disposing mind*, memory and understanding, do make this my last will and testament, as follows." Gives, devises and bequeaths all the property before enumerated and described, &c., to executors on certain trusts after her death.

The qualified executor filed his bill in equity, prayed that the will be established and Complainant instructed in the discharge of his duties as trustee thereunder.

The Court, (12 Rich. Eq., 359,) after stating that in 99
South Carolina the creation of a separate estate in a married woman only excludes the marital right of beneficial ownership, and does not beyond this remove the disabilities of coverture or have the right of disposition incident to or inhering in it, and that such power may be added in the instrument creating such separate estate, goes on to say that "a married woman having a separate estate and having also a general and absolute disposition over it may dispose of it as one *sui juris*, only her 100
intention to do this must be clearly manifested. It cannot be necessary that whenever she makes a gift or other disposition of an article of property, or sells the produce of her farm, she shall make express and formal reference to the instrument by virtue of which she is empowered to do this. *Having no power to dispose of corpus or income except as conferred by the instrument, each act of disposition ought reasonably to be referred to 'the only source of her power,' and she*

ought to be considered as having made the disposition in
101 *the execution of the only power which could make it effectual. It is not the case of a power of appointment, general or special, where more strictness may be proper.* We are of opinion, however, that in the terms of the testamentary paper executed by Jane Reid there is a sufficient reference to her general power of disposition, secured by the contract of herself and her husband, notwithstanding the coverture, or against the disability which coverture would else have imposed, to make her will a good and valid execution of that power. The
102 power of disposition reserved or secured to Jane Reid by its terms embraced not only the specific property which she then had in her possession, but also 'all the income thereafter to arise therefrom, or in any wise from that then existing properly to proceed. This involved the power to invest the income in the purchase of other property, real or personal, *and at last dispose of the original corpus, with all the accumulations of income, in whatever form invested.*"

103 In the case at bar, Mrs. Clemson could dispose of the accumulations of income by her "*full testamentary power;* she could dispose of the corpus by executing her power of appointment.

Now this case has been cited for Appellee; we say it is a strong case for Appellant.

Messrs. Wells & Orr at page 16 and Messrs. Smythe & Lee at page 33 of their Briefs quote from *Hopkins* v. *Mazyck*, Rich. Eq. Ca., 268, a case which is most decidedly on the line contended for by Appellant. See
104 the clauses of the will at pp. 268, 269 and 279, justifying what is said at page 272, paragraph 2: "But again I cannot agree," (with counsel so contending) *that by the term my estate, he meant his father's in all the clauses of his will. When he means to include his father's, he does so by express words. He did not confound the two estates, but distinguished between them.*" And at page 273: "To the effectual execution of a power of appointment, the intention to execute it is essential.

A reference to the subject matter to which the power relates is sufficient evidence of such an intention, and when the intention to execute the power is manifest, the estates, limitations, &c., created by the person executing such power, are to be judged of by the same rules as if the property were actually his own and he had created such estates, &c., out of it. Now the real estate of Benjamin Mazyck, the donor of the power, is *expressly* alluded to, *not only* in the clauses of Stephen's will, (the donee of the power,) wherein he devises it for life to his sons with remainder over to such issue of theirs as might survive them, but in the 13th clause, see pp. 268, 269 and 279. What comfort is there in this for Appellee? 105 106

As to *Boyd* v. *Satterwhite*, (10 S. C., 54,) cited by Messrs. Orr & Wells at p. 17, and by Messrs. Smythe & Lee at p. 30, fol. 119, and p. 33, fol. 129, of their Briefs, the testator (whose will created the power) was an uneducated planter, little acquainted with legal or commercial terms, and he employed a like person to draw his will.—10 So. Ca., 53; 12 Rich. Eq., 494. The obscurity of the unprofessional language of the will creating the power must be considered in connection with the terms used in the deed of marriage settlement, (claimed to execute the power,) which alludes to the will as the source from which the rights disposed of by the deed are derived. There certainly had been no adjudication upon the will creating the power at the time the widow, Lucinda, the donee of the power drew her will, (1857) or at the time she executed her marriage settlement, 1858, and it may have been uncertain in her mind exactly what was the character of her estate or interest in those lands. She recites the will and refers to it as the source whence she derives any right she may have in the property. She describes the property and disposes of it. *She intended either to execute the power or to recite it and ignore it.* The power of disposal was given without any restriction as to the nature of the instrument by which it was to be executed. 107 108

109 The contest was between parties claiming that the power had been executed—one by a will, the other by a later deed of the donee of the power. After citing *Standen* v. *Standen*, 2 Ves., Jr., 589, that the will of the donee of the power there was held to be an execution, because the intention was manifest from the fact that she had no other real estate, and holding that this case (*Boyd* v. *Satterwhite*, 10 So. Ca., 55,) is stronger than *Standen* v. *Standen*, because *the property is specified and described*, the Court decided in favor of
110 the power being executed by the deed.

As to *Moody* v. *Telder*, 16 S. C., 563, cited by Orr & Wells, p. 18, and by Messrs. Smythe & Lee, pp. 31, 33, of their Briefs. The excerpts in Briefs for Appellants give by no means a full or accurate account of the decision. By reference thereto it will be seen: 1. That this case, like that of *Finley* v. *Hunter*, 3 Strob. Eq., 84, (16 So. Ca., 561,) was adjudged upon *the strong and peculiar* phraseology of the testator's will conferring the power and a *manifest intention* appearing from the ex-
111 pressions he employed in the gift to his wife and the limitations over, and is like the case of *McAllister* v. *Tate*, 11 Rich., 510, in which it was held that a devise "in fee simple for life" carried the absolute estate.

2. That the will gave the donee of the power power of disposal, unlimited in extent, by any mode or at any time the donee chose, of the corpus of the estate, (16 So. Ca., 561,) and the power was exercised, *for valuable consideration*, by the instrument executing the
112 power, which not only described the entire corpus, but in the habendum clause conveyed it absolutely.—16 So. Ca., 559, 564.

3. That the instrument relied on as an execution of the power might fairly be construed as a power of attorney authorizing the grantee to execute the power for and in behalf of the donee of the power.—16 So. Ca., 565, 563.

4. That the party claiming that the power was executed waived all pretense that it was executed so far as

the land was concerned, which was all that was left 113
of the estate. That the parties claiming that the power was not executed abandoned all claim for account except for the value of three negro slaves who had been sold before the war, and of course did not remain of the property at the death of the life tenant, 1873.—16 S. C., 560: the remainderman being entitled only "to whatever portion of the property might be remaining" at that time.—16 S. C., 559.

5. That the only ground on which the whole Court 114
concurred was that there could be no accounting for the value of the three negro slaves, because of the emancipation before the falling in of the life estate.—16 S. C., 566, end of case.

This case gives no support whatever to Appellee's case. *Scaife* v. *Thompson*, 15 S. C., 357, we shall have occasion to use Appellant's citation: "In ascertaining the subject of a testator's disposition, the Court may inquire into the situation of his estate, and into every material fact which is auxiliary to the just interpretation of his words, for the purpose of identifying the thing 115
intended by the words conveyed." And the sentence immediately following: "Any evidence is admissible which merely tends to explain and apply what the testator has written, *and no evidence can be admitted which merely shows what he intended to write.*" Both of these sentences in *Scaife* v. *Thompson*, 15 S. C., 357, are from *McCall* v. *McCall*, 4 Rich. Eq., 455, 456, from which at 4 Rich. Eq., 451, we further quote: "It is a familiar observation that you may and should learn the 116
exact posture of a testator's affairs at the date of his will, and that this knowledge may be obtained by parol. Certainly the posture of a testator's property can hardly be learned otherwise than by parol. Parol is competent therefore to prove it. But for what purpose is this information desirable? Is it not simply to enable the Courts to apply the will to the property? You see in the will property described so and so, and disposed of thus and thus. You learn by parol that

there is property answering to the description. The will is then applied to it in the way directed. This is *construction. If there be two or more subjects to which a given provision may be applied, that one is supposed to be intended which answers most completely the description given.* But no provision can upon any safe or sound principle be applied to a subject which does not, in some sense, answer to the description given. * * * But it should be steadily observed, *that it is the will of the testator, and nothing but the will*, that is to be so applied. *It is words found in his will* that are to be applied; not the words of a witness testifying what he meant or did not mean. The words are to be applied by construction, and not by proof of the intention with which they were employed. * * * Where a subject has been found among a testator's property answering in some sort a description given by him in one of his legacies, parol may be received to show the existence of another subject or article of property better answering the description, and then the will is applied to that. But this is not evidence to explain the meaning or intention of the will. A case of ambiguity, where it is lawful to explain the intention, is where the will is plain in its terms, but there are shown to exist two or more subjects equally coming within the terms. *If the words of the will are not equally applicable to both, the will is applied by construction, and not by explanation to that one most fitting to the words, and no parol evidence of intention can be received.* It is only when the words are as applicable to the one as the other that ambiguity exists, and this is the very meaning of the word. Then parol is receivable to show which was intended; as in the familiar case, where a legacy is given to testator's son, John, and he has two sons of that name; or where he gives his black horse, having two or more of that color.

McCall v. *McCall*, 4 Rich. Eq., 453.

Another citation from Appellant's case, *Scaife* v. *Thompson*, 15 S. C., 356: "To ascertain the intention

of the testator, we must resort not to *conjecture as to* 121
what was likely to be the wishes of the testator, but to the words in his will, and the *circumstances by which he was surrounded at the time*, and from these sources deduce his intent. We are to examine the will as a whole, and from its terms as applied to the surrounding circumstances determine *what was in the mind of the testator at the time he executed the will. For while it is true that in a certain sense a will speaks at the death of the testator, yet as it was well put in the argument of one of the counsel, it speaks then what* was in 122
the mind of the testator when his will was signed. We cannot conceive how it can be otherwise. If it be true, as it undoubtedly is, that we must resort to the words used by the testator to ascertain his intention, we cannot understand how certain words used with a certain intent then can be said to have been used with a different intent simply because the testator lived for years after he had used them, during which time many changes in his property may have occurred, when he has not seen fit to make any change in the words used 123
by him to express his intention. In this case it is very clear that the testator intended to dispose of his whole estate, not only that which he had at the time of making his will, but also that which he might thereafter acquire."—*Scaife* v. *Thompson*, 15 S. C., 356. Appellant relies for herself on the citation of Appellee from *Clark* v. *Clark*, 19 S. C., 348: "In the construction of a will, of course the main object should be to ascertain the intention of the testator; but that inten 124
tion must be gathered from the will itself, *assisted by the light of the circumstances surrounding the testator at the time of its execution.*"

The citation from *Canedy* v. *Jones*, 19 S. C., 305, and the doctrine it is cited to support, that "*Courts in construing wills are not bound by adjudicated cases*," may be dismissed with the remark that they most sensibly indicate that the contention of the Appellee suffers from adjudicated cases. As the last point in the argument of

Messrs. Smythe & Lee, page 40, "that if Mrs. Clemson
125 has not executed the power, the fee rests in the residuary legatees of Mrs. Calhoun," is "*merely suggested*," not argued, and as there is no attempt to show the remotest bearing which the case cited, *Gourdin* v. *Shrewsbury*, 11 S. C., 1, has to the issue here, it is unnecessary to make comment upon either. If the will of Mrs. Clemson is a due execution of the power of appointment conferred by the will of her mother, Mrs. Calhoun, then Appellant has no case. If, on the contrary, it is not a due execution, then the remainder, which vested in Flo-
126 ride, the daughter of Mrs. Clemson, was not divested, and on the death of Floride leaving issue (without leaving issue in South Carolina construed not to mean indefinite failure of issue, but a failure at the time of the death of the person on whose death without issue the limitation is made," A. A. 1853, 12 St., 299,) either her sole child, the infant Isabella, took her entire estate, or she took $\frac{2}{3}$ thereof, and Gideon Lee, surviving husband, took $\frac{1}{3}$ thereof. Gideon Lee having conveyed before this
127 suit his entire interest to Isabella, and the interest of neither being affected by the Statute of Limitations, (see Mr. Youmans's argument filed March 17, 1890, pages 4 and 5,) her appeal must be sustained. There is no *locus standi* for title in the residuary legatees, and no ground therefor has been suggested. An account of the litigation referred to in the Complaint and Answer will be found in *Calhoun* v. *Calhoun*, 2 So. Ca., 283.

LEROY F. YOUMANS.
Counsel for Appellant.

Charles A. Calvo, Jr., Printer, Columbia, S. C.

SUPREME COURT U. S.
FILED.
MAR 27 1890
JAMES. H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1418.

ISABELLA LEE, by her next friend, Gideon Lee,
Appellant,

vs.

RICHARD W. SIMPSON,
Appellee.

ADDITIONAL ARGUMENT FOR APPELLANT IN REPLY.

Constitution Job Office, Atlanta, Ga.

IN THE SUPREME COURT

OF THE UNITED STATES.

No. 1418.

OCTOBER TERM, 1889.

ISABELLA LEE, BY HER NEXT FRIEND, GIDEON LEE, APPELLANT,
vs.
RICHARD W. SIMPSON, APPELLEE.

Additional Argument for Appellant in Reply.

We submit the following as an addition to brief in reply to the argument for appellee.

The argument for appellee seems to make the following points:

1st. Want of legal title in Miss Lee, will prevent her having a remedy. That in all cases both in law and at equity, complaint must prove such title or fail. The cases cited, merely show that recovery must be had on the strength of plaintiff's title, legal or equitable, as the case may be. (7 Wheat, 161.) That to recover in *ejectment*, *legal* title must be proven, (21 Howard, 483,) and that the mere existence of an equitable title in complainant will not give equity jurisdiction, (113 U. S., 554). The corrollary sought to be drawn, that the absence of legal title in a complainant would defeat any relief at law or in equity,

is a fine illustration of the *non sequitur;* it would prove, if true, that a ward of chancery with every equity on earth, could never recover against a faithless trustee, because such trustee held the legal title. The decision in 113 U. S., 554, fully recognizes this distinction.

2nd. Much argument is expended to show that Mrs. Calhoun, in making her will, speaks of this bond and mortgage as personalty, and as a bequest, signifying thereby that it was personalty and not realty. This is true, and correctly describes it at that time. It is also true that she properly spoke of it as the property to given to Anna for life. But this does not militate at all against the fact that the property and estate to which Anna was *entitled* under said will was an estate for life in said bond and mortgage, or its proceeds.

3rd. In construing Mrs. Clemson's will, perhaps no better reply is needed to the argument of counsel than the definitions to be found on page 15 of the brief of Messrs. Smythe & Lee. We say that Mrs. Clemson was entitled to bequests, or legacies under Mrs. Calhoun's will, and that these bequests and legacies were of the property of Mrs. Calhoun, given Mrs. Clemson for life. But these legacies which she had were, to use the language of the brief above referred to, her "interest in her mother's will," which was solely a life estate in said property, and such life estate, with its product, was her legacy thereunder. Counsel say "imitating her mother when she made her will, Mrs. Clemson makes an inventory of her estate, or what she supposed she had." If this be correct, then, clearly, her purpose in this recitation was but to enumerate her own property, and, in describing her legacies, she was merely calling attention to one source whence her property was to be drawn; and she does likewise in referring to the distributive shares of her brother's and sister's estates.

Counsel say, on page 18, that her income or interest derived from this legacy cannot be properly described as legacies to which she was entitled.

It will be noticed that in this preamble Mrs. Clemson is enumerating the sources from which her property and estate has been, or is being, drawn. Her reference to her distributive share in her brother's and sister's estates was but the mention of her interest therein, and such share was but the intangible interest which would finally bring to her certain property. Therefore she does not bequeath either the legacy or the distributive share, but, having enumerated the sources whence her property and estate has, or is to, come, she then bequeaths the property and estate to which she is entitled, viz: her property and her estate, derived from these legacies and from these distributive shares, or from any other source, whether now or hereafter to be acquired, and disposes of that, and that alone, by her will.

We have already argued how Mrs. Clemson, in this preamble, shows that she is speaking of property of her own, to which she is entitled. The word "entitled" being one which describes a common character of ownership which she has, both in the legacies and in the distributive shares.

So likewise with the power referred to. It is a power common to all, her property, by which she can dispose of the same—*i. e.*, her property, derived from legacy and distributive share alike.

Counsel seek to make the full testamentary power, alluded to, mean power, not of making a will, but conferred by will. This testamentary power, she says, is one which she has over the legacies and also over the distributive shares. Let us apply the definition suggested by appellate's counsel and, according to them, given by the Circuit Court,

and instead of eliminating, as they do, all mention of the distributive shares, let us read this preamble:

"WHEREAS, I am entitled to a distributive share of the estate of my deceased sister, and have full power given to me by will (meaning the will of my deceased mother) to dispose of the same."

This application demonstrates the fallacy of this definition. Testamentary power, or testamentary capacity are well known terms, and signify the power or capacity to make a will. To decline to make this application is to emasculate the word "same," and destroy its plain meaning and reference. But if it be that the testamentary power invoked is one that applies equally to all the sources of property enumerated, then to give this phrase "testamentary power" a signification which makes it applicable to every part of the preamble, to give the word "entitled" a definition applicable to each of the objects referred to, we must understand the reference to legacies as solely the scheduling of testatrix's own property and as carrying the meaning and reference contended for by appellant in this case.

It is argued that the distributive shares were small compared to the property subject to appointment, and therefore testamentary power over them is not alluded to. Mrs. Clemson considered them large enough to mention, and conceding that they are small, the very reference to them, though small, affords an additional argument that Mrs. Clemson was referring only to her own property, and not to that to which she was not entitled, but to which she could appoint.

We have already argued how natural was the reference, in a lawyer, grown gray in drafting wills for married women under the common law, in the face of a recent enabling statute, a sort of omnibus marriage settlement,

to both the power and the separate estate. It is admitted this will was drafted by an eminent, learned lawyer.

It is insisted that Mrs. Clemson had the exercise of this power over this estate, then vested in another, uppermost in her mind, and that the execution of this power was her chief aim in this will.

How easy to have done so.

How easy to have drawn this will:

"WHEREAS, I am entitled to dispose of certain legacies "under the will of my deceased mother, Floride Calhoun, "and am entitled to a distributive share" etc., "and notwithstanding my coverture have full testamentary power "to dispose of the same," "Now, etc.," "I will, etc., the "entire property and estate of which I am now in any "wise entitled to dispose and which I may hereafter "acquire, etc."

It is inconceivable that an astute lawyer, charged with the prime duty of executing this power, should not have done so beyond cavil. The only reasonable explanation of this will is that Mrs. Clemson and her lawyer did not intend to do any such thing.

Again, in the contemporaneous formal legal instrument substituting Clemson for Noble as trustee, "evidently prepared (so say our opponents) by the same lawyer that prepared the will," we find him setting forth *in extenso* the power vested in Mrs. Clemson to change said trustee, showing how particular and careful he was.

Counsel say we find Mrs. Clemson using in this paper certain common, general terms, such as "legacy," "property," "entitled," and that the same are found in Mrs. Calhoun's will. It would be remarkable if this did not occur in a paper which purported to copy from the will and name the new trustee in the language of the will.

On page 19 of their brief counsel recognizes the limitation of the word "entitled," as we contend, they recognize by the disjunctive, "legacies *or* property to which "she was entitled *or* over which she had the power of "disposition under her mother's will" that "entitled" did not embrace or describe those legacies over which power alone was given.

The question of the meaning of the contemporaneous instrument of substitution of a trustee has been discussed. The answer of the argument of appellee, we submit, is fallacious. We answer his points in order:

1st. A person may well bequeath the property she is now owner of, or may acquire, derived from the legacy of a productive life estate.

2nd. It is strange to argue in one breath that a lawyer carefully drew this paper, using certain exact expressions, and then insist he did not know the signification of what he was doing.

3rd. Complainants bill sets forth the language of Mrs. Calhoun's will and codicil (Transcript pp. 4 and 7) that Clemson took the title to himself at the sale as trustee under the conditions of the will and still held it. (Ib. p. 8) and prays *inter alia* to remove a cloud and declare Oratrix the holder of the absolute title in fee simple. (Ib. p. 11.)

4th. The Court held that Clemson, having taken the fee to himself, but under the terms of Mrs. Calhoun's will, took for complainant's benefit if she was entitled as claimed.

A certain letter written several years before the will, and this paper of substitution is quoted, and the use of the word legacy therein is seized on. The descriptions in the letter are informal on their face; so far as the change of investment was concerned it was a change of the in-

vestment of Mrs. Clemson's legacy. It was written from the standpoint of her own enjoyment of, and usufruct in, the property to be bought and sold. It affords no canon of interpretation for the will.

A great deal is said of the circumstances surrounding both Mrs. Calhoun and Mrs. Clemson.

As far as their estates are concerned we do not care to add to the statement of property set forth in arguments filed in chief except to correct an error of ~~complainant~~ counsel.

The share from the estate of Cornelia Calhoun when wound up was not $403.37 but $601.93. (Add. Transcript, p. 20.) Counsel have confused the share of the division of proceeds of foreclosure sale with entire estate. (Add. Transcript, pp. 5 and 6.)

There is no evidence that Mrs. Clemson and her husband needed money as argued. The cause of wishing to sell imported pictures is not shown, and as stated by counsel for appellee, Clemson was a man of means. (Smythe & Lee Argument, p. 11.)

The picture of Mrs. Clemson's grandmother was her own. There is plenty evidence in Mrs. Calhoun's will that what she gave to Mrs. Clemson was for her very own. The exclusion of marital rights is one of intention. No set words are needed.

Prout vs. Roby, 15 *Wall*, 471.

Appellant's counsel cite certain rules of law as to the admissibility of parol evidence to show the surrounding circumstances of testatrix; but we contend that what they claim to be surrounding circumstances are not such within the meaning of the law. Surrounding circumstances may be introduced to aid in the interpretation of a will, but the will, if unambiguous and operative, must govern, even though the court should think the testatrix intended to do something else, if such intention is not the

meaning to be derived from the unambiguous terms of the will. In this connection we cite the following:

"Returning, however, to the general rule, it is clear "that parol evidence of the intention of a testator is inad- "missible for the purpose of controlling or influencing the "construction of the written will, the language of which "must be interpreted according to its proper acceptation "as the context of the instrument and the state of the cir- "cumstances existing at the time of the execution (which, "as we shall presently see, forms a proper subject of in- "quiry) will admit of. No word or phrase of the will can "be diverted from its appropriate subject or object by ex- "trinsic evidence, showing that the testator commonly, "much less on that particular occasion, used the words "or phrases in a sense peculiar to himself, or even in "any general or popular sense, as distingushed from its "strict and primary import."

1. *Jarman on Wills. Side page*, 417.

Also, "And it may not, perhaps, be quite superfluous "to observe, that relative pronouns, which have no inde- "pendent force or signification, but whose effect depends "wholly upon the position which they occupy in the "instrument, cannot, by means of parol evidence, be "shifted, so as to relate to a different antecedent."

1. *Jarman on Wills. Side page*, 419.

Says the same authority, "And in every case it must "be remembered, that, whatever the surrounding circum- "stances, it is still the will that is to be construed." In the words of an eminent judge. "When the court has "possession of all the facts which it is entitled to know, "they will only enable the court to put a construction "on the instrument consistent with the words; and the "judge is not at liberty, because he has acquired a knowl-

"edge of those facts, to put a construction on the words "which they do not properly bear."

Attorney General vs. Drummond, 1 *D. and War.* 367.

But the testimony is not fully set out; only a statement of a part of the alleged parol proof is given. The testimony of Mrs. Sallie Calhoun shows that Mrs. Clemson's remarks about Fort Hill were made to satisfy her husband's whim, but that she did not want the property to go to the college scheme.

Mrs. Clemson told her Isabella Lee would get it; that she believed in property going to next of kin; that she only consented to sell the place under the Trescott letter to humor Clemson, knowing that the price named would prevent it. (Add. Transcript, p. 45.)

Here is the spectacle of a woman urged to this course by her husband. She does not wish to divert the course of her mother's will, but would let the property go, as her mother's will sent it, to the next of kin. She wished to humor, but to defeat her husband's purpose. She sends for an eminent lawyer to make her will. Doubtless she tells him her dilemma. He drafts the will. After Mrs. Clemson's death, Clemson quarrels with this lawyer. No one knows why. (Add. Transcript, p. 45.)

But the idea that this will was intended to operate on this property to enable it to be devised for their college is absurd. Why devise it in a way that in one of the possibilities of life, contemplated by the very will, would have necessitated the making of another will, or the defeat of the cherished plan. If this property had been meant to pass under this will, Mrs. Clemson would have left it therein for a college after Clemson's death intestate, or in event she survived him; and as long as her inten-

tion held firm, her will would have carried out her purposes, and no further will or codicil would have been needed, except in the event she wished afterwards to make a change. But if this will passes Fort Hill, testatrix has made a will, as it stands, that had Clemson died intestate or before testatrix, she must have redrawn in order to carry out her intention entertained when the will was made, in the very contingency that she was contemplating, and to have then expressed an intention exactly contrary to what she had declared in her will. The argument of the possibilities of change in times and circumstances as to an instrument that can be altered at will is hardly forcible when it involves the leaving to further change, the carrying out of alleged present intention, and expresses an intention at direct variance with the alleged parol intent, which might have been expressed and would not have needed to be changed. Remember the will was not drawn hurriedly, but in 1871, four years before testatrix death.

Reviewing the cases cited by appellee (Smythe & Lee's argument, p. 33), from South Carolina, we are unable to agree with counsel as to their effect. The recital of facts of case in Boyd *vs.* Satterwhite, 10 S. C., 54, is evidently taken from an erroneous recital made by one of the parties, disaffirmed by the court, and is not as we read the decision.

Testatrix did not have an absolute estate in one-half of the tract of land. She had a life estate in the whole with a power of appointment at her death in one-half, and the other half was limited in remainder to others. She disposed of the tract of land reciting her ownership of the whole for life, and *erroneously* reciting that one-half of it she owned absolutely, and conveyed her life estate therein to certain uses and at her death "the

tract of land as far as she may have any legal interest" to another on different terms.

Her conveyance would have been absolutely without effect except as an execution of the power. The court says that the expressions used would execute the power "provided the words could not apply to any other property of the donor." (Page 55.)

In Hopkins *vs.* Mazyck, Rich. Ch. 269, the words of the will in other parts refer to lands and negroes in such way as to make the will contradictory, and in great part insensible, except as an execution of the power, while the chancellor whose decree is affirmed rules expressly that the words "*my* estate" cannot, even in this will, when standing alone, be taken as an execution of the power.

In Moody *vs.* Tedder, 16 S. C., 269, the power to the widow was to dispose of the property to pay for her comfortable maintenance and support and pay her debts. She made a deed to Griggs, the consideration of which, as stated, was expressed to be her support for her life and the payment of debts which were heavy. The remainder was only of the balance not disposed of by her. She deeded her "interest and life estate." The court took it, she meant to convey by *interest* more than the life estate, as it was mentioned as additional thereto. The consideration was that for which she could dispose of the fee, and unless the fee was conveyed, would have been excessive, and even in this case the court was not unanimous as to the execution of the power, one of the judges concurring on special grounds involving the rights of the remaindermen to otherwise recover.

In the other cases cited, before commented, such as L. R. 2 Eq. Cas., p 815, and 2 Vesey, 589, the absence of any other property of any sort to operate on, and the consequent *entire failure* of the will, is the ground work of

the decision. Compare the case of Evans vs. Evans, 23 Beav., 1, cited in argument of Calhoun, K. & S., p. 47, and the entire distinction between these cases and those governing this will will be most apparent.

The reference to the case of Wildbore vs. Gregory, L. R., 12 Eq., C. 482, is most unfortunate. We append a full report of the case, the power, despite the apparent reference, being declared not executed.

Wildbore vs. Gregory, L. R. 12 *Eq. Cas.*, 482.

Under a marriage settlement, dated in 1840, power was reserved to the husband to appoint, after the death of his wife, should she survive him, "so much" of a particular freehold estate settled by him "as shall not exceed an annual income of £300" to the use of the children of the marriage, the same to be, in default of appointment, for the use of the children equally, the residue of the estate to be to the use of the husband absolutely. By his will the husband gave, devised and bequeathed "the whole of my property, real and personal, consisting of a farm (describing the freehold estate above mentioned) and whatever may devolve to me by virtue of the marriage settlement," to the trustee upon trust after the death of his wife, for his five children in unequal shares. He further gave to the trustee a discretionary power either to divide the income of "my entire property" according to the provisions before made, or to sell the whole and divide the proceeds.

Sir James Bacon, V. C.:

"I cannot decide this case in favor of the petitioner "without going against the authorities. This gentleman, "at the time when he made his will, was seized of the "whole of this estate, and, I presume, was also in posses-"sion of it. The £300 rent charge did not arise until his

"death, but to the extent of the hereditaments which were "required to raise the £300 rent charge, the farm at Til- "ton was in the testator's possession, whatever he may have "thought. I think he cannot be considered, by using the "words 'my property,' to have intended to deal with "property over which he had only a power of appoint- "ment, when there were property of his to which the "words, giving full effect to them according to the terms "of the will, exclusive of the settlement, would apply."

Appellee's counsel seek to evade the force of the argument that the will of Mrs. Clemson only devises the property and estate to which she was entitled by urging that she did not say "my property." But this is an error. In providing for what she had above devised, in event of Clemson's death before her or intestate, she bequeaths it, as" *my* entire property and estate," to Isabella Lee.

The implied attack on Miss Lee in brief of Smythe & See, pp. 22–23, hardly merits a reply. The conclusive answer thereto is that if Appellant cared alone for the money value of Fort Hill she can obtain that by accepting her grandfather's legacy of $15,000, which legacy she is to lose under an *in terrorem* clause of the will. (Add. Transcript, p. 17,) by attempting to frustrate the purposes sought thereby. But if sentiment be not wholly dead, Isabella Lee, a girl, might well deem Fort Hill with its historic memories, best in the hands of the son of the eldest son of Jno. C. Calhoun, the only surviving lineal descendant born thereon, rather than to see it a foot-ball for political faction in an agricultural college or in the hands of a stranger.

We conclude, construing Mrs. Clemson's will:

1st. Appellee's contention twists from its plain legal meaning the word "legacies" in the preamble, ignoring all distinction between property and power.

2nd. It gives to the word "entitled," therein, a meaning confessedly erroneous, and gives it one meaning as applied to the legacies, and a different one as applied to the distributive shares.

3rd. It ignores the collocation of the legacies and distributive shares, as sources of property to which testatrix was equally entitled.

4th. It gives to "testamentary power" a signification utterly insensible as applied to such distributive shares.

5th. And while the plain sense refers the word "same" equally to legacies and distributive shares, seeks to avoid the above difficulty by restricting its meaning in a way violative of all rules of construction.

6th. It ignores the plain reference of the common testamentary power to legacies as equally with distributive shares, signifying, as its legal meaning indicates, a source of the property and estate to which testatrix was entitled, and which was subject to her general, full testamentary power over her own estate.

7th. It ignores the meaning of the words "property and estate" which testatrix says she is "entitled" to, and would make it cover what she is not entitled to, ignoring the distinction between property and power and the plain suggestion that the mention of her property by testatrix would imply her intention not to execute her power.

8th. It ignores the further description of the property and estate bequeathed as "my property and estate," giving no meaning to the word "my" and violating the rule that all words shall be given signification in arriving at the meaning of the will.

9th. It seeks fortification from an alleged imported purpose by testatrix, which cannot be found in the will, which, if true, either demonstrates that the will was not

intended to pass this remainder estate, or establishes a purpose of disposition which would be utterly defeated in an event contemplated and provided for by the will, if the will was allowed to remain unrevoked.

All of these troubles are obviated by adopting the construction of the will appellant contends for. It is, we submit, the true meaning of this will, and should be so declared.

ALEX. C. KING,
LEROY F. YOUMANS,
of Counsel, for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1418.

ISABELLA LEE, BY HER NEXT FRIEND, GIDEON LEE, APPELLANT,

VS.

RICHARD W. SIMPSON, APPELLEE.

Brief Submitted on the part of the Defendant in opposition to Plaintiff's Motion for time to File Additional Arguments herein.

Notice has been served upon appellee of a motion to be made on 17th instant on the part of the appellant, for an additional extension of twenty days, within which to file additional arguments, or arguments in reply. Appellee objects to this motion and to the extension asked, on the grounds following, to wit:

First. The case was fully argued in the Circuit Court, upon printed arguments submitted on both sides, copies of which were given to each side. The appellant's counsel, therefore, had printed copies of the arguments, so submitted by the appellee, in possession, when preparing their arguments for the appeal to this Court.

Second. Because, under the order of the Circuit Judge, allowing the appeal herein, the appellant was put upon terms to submit the whole case within ninety days from the opening of the term. But the appellant made default in not forwarding to this Court even a proper record from the Court below. The record, as originally made, had to be amended by filing an additional record, to which the

appellee consented, but which was not printed until after the expiration of the said ninety days. This involved a further delay in the submission of the case, wholly arising from the fault of the appellant.

Third. Because by stipulation between counsel herein, and of record in this case bearing date the 20th January, 1890, it was provided that the time for filing printed arguments in the cause should be extended until the 10th of
5 March, 1890, and that up to that date arguments might be filed in behalf of either appellant or appellee, counsel for appellant having the right to file additional arguments to those already filed, or to withdraw those filed and substitute others in their stead. This stipulation was made after a full discussion as to whether appellant should be allowed time to file arguments in reply, after the filing of the arguments of appellee. This request was objected to by appellee, who refused to sign the stipulation with such a provision, or to consent to any further delay.
6 It was finally withdrawn, and waived, by counsel for the appellant, and thereupon the stipulation was entered into. Appellant having accepted the stipulation on these terms, has now no right to renew the request.

Fourth. Because by further stipulation between counsel herein, also dated and filed in this Court on the 20th January, 1890, it was stipulated that the facts contained in the printed brief submitted by the honorable the Attorney-General of South Carolina, on the motion to advance the cause, were correct; and, further, that counsel for appellant
7 concurred in consenting to the motion to advance the cause, either for oral argument or on printed brief. In and by such stipulation, counsel for appellant submitted the cause to the discretion of this Court for such order as it might deem proper in the premises, without stipulating for or suggesting any extension of time to file arguments in reply.

Fifth. Because counsel for the appellant in open Court consented to the motion that the cause should be sub-
8 mitted on printed argument, if the Court should determine

not to advance it for oral argument during the present term. This was an absolute submission to the Court without any mention of an extension of time, and was made after the stipulation between counsel had been entered into, at which time the right of filing arguments in reply had been waived.

Sixth. Because this Court, by its order made the 27th of January, 1890, ordered that the cause should be submitted on printed briefs on or before the third Monday in March next. This order has been acquiesced in by both parties, as final in the premises, and the case is now ready to be and is submitted on printed briefs in accordance with this order. The notice for further time was only given a few days ago, and defendants object to any further opening of the case, and to any further extension of the time, so long after the filing of the said order, and at this stage of the proceedings.

AUGUSTINE T. SMYTHE,
JAMES L. ORR,
Counsel for Appellee.

JOSEPH H. EARLE,
Attorney-General of South Carolina,
Of Counsel.

STATE OF SOUTH CAROLINA,
COUNTY OF CHARLESTON.

Personally appeared before me Augustine T. Smythe, who being duly sworn, says that he is one of the counsel of appellee in this case, and that the statements contained in the foregoing brief are true to his own knowledge.

A. T. Smythe.

Sworn to before me this 13th day of March, A. D. 1890.

W. M. Porter
Notary Public, for S. C.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1418.

ISABELLA LEE, BY HER NEXT FRIEND, GIDEON LEE,

vs.

RICHARD W. SIMPSON.

ARGUMENT SUBMITTED ON BEHALF OF DEFENDANT, APPELLEE.

AUGUSTINE T. SMYTHE,
A. M. LEE,
SMYTHE & LEE,
Defendant's Solicitors.

JOSEPH H. EARLE,
Attorney-General S. C.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

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ISABELLA LEE, BY HER NEXT FRIEND, GIDEON LEE,

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ARGUMENT SUBMITTED ON BEHALF OF DEFENDANT, APPELLEE.

2

Question Stated.

The issue in this case narrows down to a question of ownership of the Fort Hill Plantation.

The complainant avers and claims that the fee simple absolute is in her.

The defendant, on the contrary, avers that the title in fee was in his testator, Thos. G. Clemson, and is now in him as his executor.

3

Rules Governing Inquiry.

There are certain fundamental rules which govern these controversies involving title to real estate, whether the case be at law or in equity.

1. The first is succinctly stated in Watts *vs.* Lindsey's heirs, 7 Wh., 161, and affirmed in numerous cases since.

"It has been long and well established *as a rule of law and equity* that a party must recover on the strength of his own title, and not on the weakness of his adversary's title."

4

2. Another is that the complainant

"Must in all cases prove a *legal* title to the premises in himself, at the time of the demise laid in the declaration, and that evidence of an *equitable estate* will not be sufficient for recovery. These are principles so elementary, and so familiar to the profession, as to render unnecessary the citation of authority in support of them."

Fenn vs. Hohne, 21 How., 483.

The fact that the complainant's title is equitable, does not give her the right to go into equity. This is laid down
5 in Fussell *vs.* Gregg, 113 U. S., 554, where the Court, after a full discussion, says:

"The theory of complainant's bill seems to be, that, because she has an equitable title only, and for that reason could not recover in an action at law, a Court of Equity has jurisdiction of her case. *But this is plainly an error.*"

3. And still another rule is, that if the evidence shows that the strict legal title is neither in the plaintiff nor the defendant, but is in some third person, then the defendant is en-
6 titled to judgment in his favor. For the complainant cannot recover, unless the full legal title be in her, and outstanding title in any one else bars her recovery and leaves the defendant in possession.

Therefore, to entitle the complainant, Isabella Lee, to a decree in this case, she must show a perfect legal title in herself to Fort Hill.

To defeat the complainant's recovery, the defendant may
7 show, either

1. That the legal title to the property was in his testator, and is now in him as his executor; *or*

2. That the legal title set up by the complainant is not perfect; *or*

3. That the title to the property is outstanding in some third party.

Facts of the Case.

Bearing these principles in mind, let us look at the facts in
8 the case.

Both parties claim under the will of Mrs. Floride Calhoun.

The complainant directly, as remainderman under her will.

The defendant for his testator through the will of Mrs. Anna C. Clemson, executing her power of appointment.

The defendant further denies that the legal title is in the complainant, but that if Mrs. Clemson did not execute the power, this title is outstanding in residuary legatees of Mrs. Calhoun. 9

Will of Mrs. Calhoun.

The first step is to examine the will and codicil of Mrs. Floride Calhoun and see how they affect this question.

THE WILL is dated 27 June, 1863.

After directing her executor to pay her debts, she gives *in clause 2* to her daughter Anna Maria, wife of Thos. G., Clemson, of Maryland, for her life, a house and lot in Pendleton, and the furniture therein, and at her death to her 10
daughter Floride, (afterward Mrs. Lee,) and if Floride died without issue, to her sons, John and William's children then living, or to their issue.

After a number of specific legacies, including one of $1,000 to her grandson, John Calhoun Clemson, she states in clause 19 that she is possessed still of a large residue of property, consisting principally of a debt due her by her son Andrew, for the purchase of Fort Hill, amounting to about $40,200, secured by bond and mortgage. That she had also an undivided interest in a gold mine in Dahlonega, Ga. 11
belonging to the estate of her late husband, and also an interest in the estate of her son Patrick and her daughter Cornelia, besides other property. She then directs her executors to sell whatever real or personal property she may have at her death, not specifically devised, to collect in the residue as speedily as possible, and after paying Calhoun Clemson his legacy of $1,000, to divide the remainder into four parts, which she disposed of as follows:

"*Clause 20.* One part, being the fourth of the above residue, I give and bequeath to my daughter, Anna, during her life, and for her sole 12

and separate use. And at her death I will and bequeath it to her daughter, Floride, and at Floride's death, if she dies without issue, I will and bequeathed it to the children of my deceased sons, John and William, then living, equally among them, or to their issue if they be dead; issue to represent the parent.

"The better to effect my intention, in *regard to the* PROPERTY *in this and the second clause given to Anna*, I appoint Edward Noble, of Abbeville, trustee for it, and vest in him the legal title. Should Anna wish at any time to sell the house and lands in Pendleton, or all or any portion of the PROPERTY given to her for life, *the trustee*, provided it meets with his approval, *is authorized to dispose of it according to the wishes of my daughter, upon having her written request for so doing.* The proceeds of such
13 sale the trustee shall hold subject to the trusts and limitation declared in reference to the original PROPERTY. The trustee is authorized and required to invest the proceeds, and also the fourth part of the residue herein given to her, in such property *or in such way as she may in writing direct*, provided it meets with his approval. The trustee is authorized and required, from time to time, to change such investments *as often as he may be directed so to do by my said daughter in writing*, provided it meets with his approval, holding always the substituted property or re-investments subject to the trusts and limitations aforesaid. If from death or any other cause there is no trustee, or *if Anna should desire at any time to change her trustee*, SHE *shall have the power to do so*, and to appoint another, by instrument, in writing under seal, executed by her in the presence of two subscribing witnesses. And as often as SHE
14 *may desire to change her trustee* SHE shall have the power to do so, by observing the form and solemnity above described."

The remaining ¾ she divides between her granddaughter, Floride E. Clemson, and her daughter-in-law, Kate P. Calhoun, and certain of her grandsons.

She then adds the following, as

"*Clause* 24. In no event do I wish to die intestate as to any portion of my estate. *If I have failed in the foregoing clauses to dispose of the whole of my estate*, I will and direct the residuum, whatever it may consist of, to be converted
15 by my executors by sale into money, and equally divided between the *children* of my daughter, Anna, and the *children of my deceased sons, John and William*, each child of the three parents taking an equal share."

THE CODICIL is dated 22d January, 1866. In the preamble the testatrix recites that the war has affected the value of her estate, and it is necessary therefore for her to re-form her will.

She then gives to her daughter-in-law, Kate P. Calhoun, in lieu of the share formerly given her in the residuary estate, the house and lot devised in her will to Mrs. Clemson
16 thereby revoking that devise.

She then proceeds as follows:

"2. By the 19th clause of the will, I direct the said bond debt, on my deceased son, Andrew, secured by mortgage on Fort Hill, together with all other property possessed by me, and not before disposed of, to be collected by my executors, and the proceeds to be divided into four parts, one part I gave to Anna: one part to her daughter, Floride, and the other two parts to Kate and her children, as will appear by clauses 20, 21, 22 and 23 of the will. I desire now to change this disposition of said bond and mortgage debt, and do now give and bequeath it in the following manner:

"Three-fourths of my interest in said bond and mortgage debt, amounting to about $40,200, I hereby *give and bequeath to my daughter, Anna M. Clemson*, to be enjoyed by her under clause 20 of the will, and according to the provisions of that clause to vest in the same trustee, and to be subject to all the powers, trusts, conditions and limitations of that clause, precisely as the bequests therein made were subject to them, *with this exception and alteration, that my daughter, Anna, is hereby authorized and empowered by a last will and testament duly executed by her, to dispose of this* BEQUEST *of three-fourths of said bond and mortgage debt as she pleases.* If she does not thus dispose of it, *at her death I give and bequeath it*, the said three-fourths, to her daughter, Floride, and should the said Floride die without leaving issue I give and bequeath it, at her death to her brother, Calhoun Clemson, but, nevertheless, Floride shall likewise have power to dispose of it at her death as she pleases, by a last will and testament, duly executed by her. By clause 2d of the will, I gave the furniture, and every article of property in my house in Pendleton, and upon the premises, with certain reservations, and also my jewelry, and some other small articles, to my said granddaughter, Anna. I now confirm to her the BEQUEST of aforesaid furniture: and all other personal property embraced in said 2d clause, which it is my will that she shall enjoy for life, as her sole and separate estate, and at her death, I give and bequeath all this personal property to her daughter, Floride, absolutely. To Anna I also give and bequeath the oil portrait of my mother, which by clause 5th of my will, I gave to my daughter-in-law, Kate.

"3. The remaining one-fourth part of my interest in said bond and mortgage debt, against the estate of my deceased son, Andrew, I *give and bequeath* to Floride E. Clemson, my granddaughter, but if she dies without leaving issue, I give and bequeath it to her brother, John Calhoun Clemson: she, nevertheless, is hereby authorized and empowered to dispose of said fourth part as she pleases, by her last will and testament duly executed. I also give my said granddaughter, Floride, the twelve silver napkin rings, given by clause 15 of the will to Mary Lucretia Calhoun, who has since died.

"Should I at any time collect the aforesaid bond and mortgage debt, or any part of it, *or should Fort Hill be purchased with it*, or the money be invested in any other property, or be retained in hand, *the property thus purchased*, the property thus obtained by investment, and the money thus retained, *shall be considered and held to be in place of, and the same as, the aforesaid bond and mortgage, and shall pass under this codicil as if the same were still in the form of said bond and mortgage;* that is to say, shall pass to *my daughter*, Anna, and *granddaughter*, Floride, as aforesaid bond and mortgage debt is directed to be divided between them."

By clause 6, she increases the legacy left to J. Calhoun Clemson to $2,000, and directs that "it shall be paid him out the proceeds of the aforesaid bond and mortgage debt, before the BEQUEST to his mother and sister shall take effect, or this legacy shall be chargeable upon whatever property I shall purchase, or upon whatever investment I shall make with the proceeds of said bond and mortgage debt."

By clause 7, she states that the residue of her estate will consist mainly of her interest in the estates of her husband, her son Patrick, and her daughter Cornelia. This residue, she directs her executors to collect in, and for that purpose
21 they were authorized to sell any real or personal estate. The proceeds to be divided: 1. To pay her debts; 2. ⅔ of the residue she *bequeaths* to her grandsons, John C. Calhoun, A. P. Calhoun, and W. P. Calhoun, children of her deceased sons, John and Willliam; 3. The remaining third, she *bequeaths* to her daughter Anna.

"In the same manner as the ¾ of the bond and mortgage debt is given to to her, and to be subject to the same powers, trusts, limitations, and conditions and to vest in the same trustee."

22 By clause 8, she provides that if the grandsons mentioned in clause 7, shall all die under twenty-one, and without issue, then their share in such residuum is to go to her daughter, *Anna, and her children.*

"First, to Anna for life, under clause 20th, of the will, and clause 2nd, of the codicil, subject to all provisions of both clauses. Secondly, at Anna's death, if she does not disposes of the same by will, to her daughter, Floride, under clause 3rd, of this codicil, subject to all provisions of that clause. However, should it be thought necessary to expend more than the income or interest of the several LEGACIES to these boys, in giving them an education, it is my will and desire, that the principals of these LEGACIES may be trenched
23 upon for that purpose, and the remainder over, under this clause, in the event of the death of all, shall be only of so much of said legacies, as remains after such educational expenditures."

Under this will and codicil, the following "*bequests*" or "*legacies*" were left to Mrs. Anna C. Clemson:

1. Three-fourths of the bond and mortgage debt due by A. P. Calhoun.

2. Certain furniture and other personal property mentioned in the 2nd clause of the will.

3. One-third of the residuary estate left after payment
24 of debts.

4. The remaining two-thirds of the residuary estate, if her grandsons died under age and without issue.

5. Her grandmother's picture.

All of these legacies, except the picture, were left to Edward Noble, in trust for Mrs. Clemson, *during her life*, with power to dispose of the same by her last will as she pleased.

If she failed so to dispose, then at the death of Mrs. Anna C. Clemson, they were to go to her daughter, Floride, 25
afterwards Mrs. Lee. Should Floride die without issue, then, at her death, to her brother, Calhoun Clemson.

Failing any other disposition they were to go under the general clause of the will, to the children of testatrix, daughter, Anna, and sons, John and William.

As to the picture, Mrs. Calhoun died in 1866.

Under the old common law rule then of force in South Carolina, the husband's marital rights immediately attached, and this picture, as personal property, became at once her husband's. 26

Edward Noble alone qualified on the will as executor, and was alive at the filing of the bill in this action.

Mrs. Floride Calhoun died 27th July, 1866.

Mrs. Floride Clemson Lee died 10th August, 1871.

J. Calhoun Clemsen died 27th August, 1871.

Mrs. Anna C. Clemson died 27th September, 1875.

Therefore, at the death of Mrs. Anna C. Clemson, neither her daughter, Floride, nor her son, Calhoun, was living. 27

The Trust Estate all Personal Property.

It is conceded by all parties that all these legacies to Mrs. Clemson, or for her benefit, were of personal property, and consisted solely of personal property at the time of her death.

In clause 4 of the codicil she expressly directs, that if Fort Hill be purchased with the bond and mortgage, it should "be considered and held to be in place of and *the same as*, the said bond and mortgage, and should pass under 28

the codicil. *as if the same were still in the form of said bond and mortgage.*"

And the residuary estate was expressly directed to consist of the *proceeds of the sales* of any real and personal estate not specifically bequeathed, and which the executors were ordered to sell after payment of the debts.

It will be noticed also that Mrs. Calhoun carefully uses technical words applicable to personal property.

In reference to all these legacies in every clause, she uses
29 the words "*give and bequeath.*" In clauses 2 and 4 of the codicil referring to the interests in the bond and mortgage, she designates them as "*bequests.*" In clause 8, referring to the interests in the residuum, she designates them as "*legacies.*"

We ask especial attention to this fact that Mrs. Calhoun in her will repeatedly styles, these provisions so made for Mrs. Clemson as "*bequests*" or "*legacies.*" These are synonymous terms.

Bouvier's Law Dictionary thus defines them:

30 "BEQUEST.—A gift by last will or testament; *a legacy.* Not synonymous with devise. *Bequest* applied more properly to gift by will of *a legacy,* that is of personal property. Devise to real property.

"LEGACY.—A *bequest* of goods or chattels by testament. This word though properly applicable to *bequests* of personal estate only, is nevertheless extended to property not technically within its import in order to effectuate the intention of the testator," &c.

We ask also to note especially that Mrs. Calhoun, elsewhere in her will speaks of the provision made for Mrs. Clemson, as "the PROPERTY given to my daughter, Anna."

31 We ask this because when we come to consider Mrs. Clemson's will we will find that she uses exactly these terms when speaking of the subject matter of the power of disposition given her by her mother's will. (Add. Rec., fol. 8.)

Mrs. Calhoun's Estate.

Next let us see what Mrs. Calhoun's estate consisted of.

The foreclosure proceedings were continued after her death, and resulted in the purchase of Fort Hill, on 1st
32 January, 1872, in the name of T. G. Clemson, trustee of

his wife, Anna M. Clemson, under the will of Floride Calhoun, for $15,000, of which $225 went in costs, leaving $14,725 net.

The statement (Add. Rec., folio 8,) shows that after deducting the share of Cornelia Calhoun, $2,173.91, and the legacy due to Calhoun Clemson, $2,620.26, and allowing rents, the balance collected on the bond and mortgage was $13,526.85, three-fourths of which went to Mrs. Clemson's trust estate.

33

This amount of $13,526.85, including $3,596.03 of rent money, under the proceedings in Court, went into "the hands of Mr. Clemson, *as trustee*, under the will of Mrs. Calhoun, of Mrs. Anna M. Clemson," and none of it became Mrs. Clemson's absolute property. (Folio 8.)

From Patrick Calhoun's estate her estate received nothing. The returns and final settlement of Edward Noble, Administrator, shows that during her lifetime, to wit: on 15th January, 1863, he paid her $500, in Confederate money, which was largely more than her interest in the estate. (Folio 33.)

34

From Cornelia Calhoun's estate, her estate derived $403.37. (Folio 7.)

From her husband's estate her estate derived nothing. The final return shows only a small balance received from Appleton on account of his books, which divided among three heirs, gave each $114.71. (Folio 75.) The gold mine only brought $410, out of which costs were paid. (Folio 70.)

35

Mrs. Floride Calhoun's estate, therefore, consisted only of the house and lot in Pendleton devised to Mrs. Kate P. Calhoun, the bond and mortgage debt, her furniture, sundry personal articles, and say $400, which she received from the estate of Cornelia Calhoun.

On 12th July, 1877, the executor, Edward Noble, filed his petition for final discharge, stating that the estate was "ready for final settlement, that *no more assets were to be collected*, and all debts were paid." That the only outstanding interest of the estate was about 1-7 or 1-8 interest

36

in the gold mine. He asked for a discharge. The record does not show that any was ever granted. (Folio 74.)

Fort Hill having been thus purchased by Clemson, as trustee, on 1st January, 1872, the next year, to wit: on 5th November, 1873, a partition in kind was made, by which the complainant, as the sole heir of Floride E. Clemson, was put in possession of her one-fourth under the terms of clause 3 of the codicil. (Folio 3.)

Circumstances surrounding Mrs. Clemson.

37 Meanwhile, on the 29th day of September, A. D. 1871, Mrs. Anna C. Clemson duly executed her last will and testament.

Before commenting on it, let us call attention to a few dates and the circumstances surrounding her.

This, as we shall see, later on, the Court is authorized and required to do.

The rule is stated in Blake vs. Hawkins, 98 U. S., 324, hereafter cited, and which was a case like this, in which the
38 Court was considering whether the will in question was an execution of a power.

"It is a common remark, that, when interpreting a will, the attending circumstances of the testator, *such as the condition of his family, and the amount and character of his property, may, and ought to be taken into consideration. The interpreter may place himself in the position occupied by the testator when he made the will, and from that standpoint discover what was intended. Such a method of procedure is, we think, appropriate to the present case.*"

Mrs. Clemson's only son, J. Calhoun Clemson, and her
39 only daughter, Mrs. Floride Clemson Lee, had both died within ten days of each other, during the month previous, to wit: in August, 1871. (Folio 2.)

Her only grandchild was at the North with its father, who refused to allow the grandmother to have it. The father was in good circumstances, and well able to take care of and provide for his child. (Folios 44–46.)

Mrs. Clemson was the favorite daughter of John C. Calhoun, and had imbibed from him the desire to assist, materially, in disseminating scientific, and especially agricultural
40 education, among the boys of his native State. Her hus-

band, himself a man of means, was in full accord with her in this desire. (Folios 52–61.)

She was in possession of Fort Hill, her father's home and her own, admirably located for the purpose of such a school. As we shall see later on, she was possessed of little or nothing else.

She and her husband had determined to devote this property, and all their joint estate, to this purpose, and to found at Fort Hill an Agricultural College, as a fitting monument to her father and their son. In the chapel was 41
to be placed a tablet to her father. It was to be a joint monument of filial and parental love. (Folios 52–61.)

Acting then in entire accord, the husband and wife made mutual wills, similar in tenor, each leaving to the other their entire estate. She knew, that without the addition of her husband's estate, the property over which she had control would not be sufficient to carry out their joint purpose. He knew, that without the property at her disposition, he would be without the site, selected by both, 42
on which the Institution was to be located. Each had confidence in the other. Each was satisfied that the survivor would loyally carry into effect the joint purpose. (Folios 52–60, 71–72.)

But they each knew that times and circumstances change, and that during the life of the survivor, (if the object was not accomplished in their joint lives,) that might happen, which would make it seem advisable to such survivor, to modify or alter the plans they had jointly determined upon.

It was, therefore, not only natural, but wise, that in mak- 43
ing their wills, they should leave the property absolutely the one to the other, testifying not only to their mutual affection, but to the mutual confidence, which they felt, that the survivor would carry out their joint intentions.

But life was uncertain. The survivor might die, without having been able to carry out the plan, without, perhaps, deeming it proper, under changed circumstances, that it should be carried out. Next to this, their cherished plan, came their grandchild. True she was kept from them, and lived with her father, amply able to provide for her. But 44

still, if for any reason, the survivor should determine to die intestate, or make no other disposition of the joint property to carry out the joint plan, then it was to go to the grandchild.

These, then, were the circumstances under which these mutual wills were made, one of which is before the Court. These were the plans and intentions in the minds of the testators as they executed them.

45 *Amount and Character of Mrs. Clemson's Property at time her will was made.*

Now let us examine into the financial circumstances of Mrs. Clemson when she made this will. In what property was she interested *then?* We will inquire later as to what property she was interested in at the time of her death.

On 14th July, 1871, an order had been made for the sale of Fort Hill to satisfy the mortgage debt. This debt then amounted to $65,718 63. The only property to pay it was
46 Fort Hill and a small amount due for rents and from sales of personal property, constituting the personal assets of the estate of A. P. Calhoun, and which afterwards realized some $4,000 or $5,000. The purchase of Fort Hill by the mortgagees, was therefore a foregone conclusion. Still, as a matter of fact, it had *not* been purchased when the will was made, and the mortgage debt was still technically and absolutely a "*legacy*" of personal property, a chose in action, under Mrs. Calhoun's will. Mrs. Clemson was therefore interested in this "*legacy*" or "*bequest*" under her
47 mother's will, which, it was expected, would be, and which, as a matter of fact, a few months later, was invested in the Fort Hill plantation. But even then under the express terms of Mrs. Calhoun's will it was still to be considered as personal property. (Folio 6.)

She had also her distributive share in her sister Cornelia's estate. But it was small, and she knew the fact. Her husband was the administrator. On 27th July, 1866, he had filed his petition for administration, in which the entire
48 estate was valued at "*about three thousand dollars.*"

Mrs. Clemson was one of seven heirs, and, as matter of fact, received only $403.37. (Folio 35, 7.)

She had also an interest in her brother Patrick's estate. This also was small. In fact, in the inventory of the estate of Cornelia Calhoun, her interest in Patrick Calhoun's estate was stated as "*supposed to be valueless.*" (Brief, fol. 197.) As matter of fact, Mrs. Clemson only received $150, and as her distributive share amounted only to $120.49. she was overpaid $29.51. (Folio 34, 35.) 49

This was all the property she had or supposed she had, when she made her will. It was all that was in her mind, all she intended to dispose of, or thought she was disposing of. This assertion, as we shall see, is borne out by the very words of her will. It is also borne out by the testimony.

The effort has been made by the complainant to show that she was possessed of other property. We think it has failed. 50

In the desperate effort, however, to do this counsel for appellant have gone outside of the record, and referred to matters as to which there is not the slightest testimony in the record before the Court.

We call attention to such references, by counsel, in their arguments:

1. To some property in Bladensburg, Maryland.
2. To some cotton claim of A. P. Calhoun.
3. To a portrait worth $1,000.

There is nothing in the record to warrant any such references. 51

They allude further, to certain rents which had accumulated on the Fort Hill plantation before it had been sold under the decree of foreclosure. But these did not belong to Mrs. Clemson. They were due to, and assets of, the estate of A. P. Calhoun, the mortgage debtor, and when they were received by Mr. Clemson, as part payment of the debt, they were to be held by him "as trustee, under the will of Mrs. Calhoun, of Mrs. Anna M. Clemson." (Folio 8.) 52

They have also proved that Mrs. Clemson received during her life the income on $5,000, invested in the Boisseau trust, some $230 or $270, annually. But there is no proof that there was any accumulation of this income. It was her annual support, and she certainly cannot be considered as intending to pass under her will, an income which terminated at her death.

Mrs. Clemson, it seems, purchased certain furniture, silver, etc., at the sale of her brother, A. P. Calhoun's estate,
53 amounting to $505.91, but they were purchased in the name of Edward Noble as her trustee, and therefore formed part of the legacy left her in trust by her mother, Mrs. Floride Calhoun, and over which she had power of disposition, and were so accounted for in the settlement of the case. (Folio 8.)

This is all she had except a portrait of her grandmother, given to her by her mother in her will. No value has been placed on it, and this was not her's, but belonged to her husband. It was devised to her in 1866. At that time
54 the common law rule prevailed in South Carolina, with all the strict provisions as to marital rights. Under this rule this picture as personal property belonged to the husband.

We have made this examination into the condition of Mrs. Clemson's affairs, because, as already stated, and as we read the decisions, it is the duty of the Court when about to interpret her will, to put itself exactly in the position occupied by the testratix.

The rule is as cited from Blake vs. Hawkins, 98 U. S., 324:
55

"That, when interpreting a will, the attending circumstances of the testator, *such as the condition of his family and the amount and character of his property, may and ought to be taken into consideration.* The interpreter may place himself *in the position occupied by the testator when he made the will, and from that standpoint discover what was intended.* Brown vs. Thorndike, 15 Pick., [Mass.] 388: Postlethwaite's Appeal, 68 Pa. St., 477; Smith vs. Bell, 6 Pet., 68. Such a method of Procedure is, we think, appropriate to the present case."

Or as Judge Sharswood puts it in Postlethwaite's Appeal, 68 Pa. St., 381:

"It has been long and well settled, and indeed it is a principle so conso-
56 nant to reason that the only wonder is that it should ever have been ques-

tioned, *that all the surrounding circumstances of a testator—his family, the amount and character of his property—may and ought to be taken into consideration in giving a construction to the provisions of his will.*"

Mrs. Clemson's Will.

We find then, that when Mrs. Clemson sat down to make her will, she was entitled to "*bequests*" and "*legacies*" under Mrs. Calhoun's will, and so styled in the will, and otherwise therein designated as "*property*," which Mrs. Clemson was authorized and empowered by her will to dispose of "*as she* 57
pleased," and the law allowed her to appoint it to her husband. This interest under her mother's will stood at that time as personal property, and was therefore strictly and technically a "*legacy*," or "*bequest*," and not a "*devise*."

She had also an unascertained interest in the estates of Patrick and Cornelia Calhoun, which were considered small.

Beyond this she had no property of her own.

Now let us see what she did. Imitating her mother, when she made her will, Mrs. Clemson makes an inventory 58
of her estate, or of what she supposed she had, as a preamble to her will. She says "Whereas, I am entitled

1. To *legacies* under the last will of my deceased mother, Floride Calhoun.

2. And to a distributive share in the several estates of (a) my deceased sister, Cornelia Calhoun, and (b) my brother, Patrick Calhoun."

This is what she believed she had. This is what she really had. Her inventory agrees with our examination of her circumstances. This is the property she intends to dis- 59
pose of by her will. And to avoid any misconception she is careful to list it all, to state fully what she thinks she has, and what she intends to pass under her will, and in doing so, she refers expressly to the subject matter of the power.

Having thus stated the property, and knowing that, as to the legacies under her mother's will she has a power of appointment only, she goes on to refer to it. She says:

"And notwithstanding my coverture have full *testamentary power* to *dispose of the same*." 60

To what did she refer? Not to her distributive shares in the estates of her brother and sister, because, under the Constitution of South Carolina adopted in 1868, she had as full legal capacity to make a will as though a *feme sole*, and needed no special power enabling her thereto. The clause is meaningless and useless, if we refer it to that interest.

But her mother had died in 1866, prior to the new Constitution, and her mother's will, after referring to her *as a married woman*, had expressly provided that

61 "My daughter, Anna, is hereby authorized and *empowered*, by a last will and *testament*, duly executed by her to *dispose of this bequest* * * as she pleases."

And in the 8th clause of the Codicil she gives the "*legacies*" bequeathed to her grandson, to her daughter, Anna, for life, with remainder over.

"If she does not *dispose of the same* by will.

Therefore, in Mrs. Clemson's will, the reference clearly is to the power conferred by Mrs. Calhoun's will. It can have no meaning otherwise. The use of the same phraseology,
62 more than that *of the exact words*, contained in her mother's will puts it beyond question that she is referring to the power there given her, and which she is executing, and intends shall be executed, by the will she is making.

Our friends on the other side, feel the crushing force of this conclusion, and ingeniously attempt to avoid it, by saying that she refers to the power recently conferred by the Statute of South Carolina on married women, to make a will. In other words, that Mrs. Clemson, or Mr. Burt, who
63 drew her will, should deem it necessary to notify the world by her will of what all the world already knew, to wit: that under the Constitution and laws of South Carolina a married woman had the power to make a will.

They urge, that because this preamble mentions also her interest in her brother's and sister's estates, therefore this reference to testamentary power cannot relate to her power under her mother's will, but to her legal capacity under the law.

But as has been ably said by Chief Justice Fuller in his
64 opinion on Circuit:

"Such statement would in that view have been wholly uncalled for, and as this particular property could only be disposed of by will, while she could alienate her own property in any way she chose, the more reasonable inference seems to us to be that she referred to the power of disposition given by her mother's testament, rather than to her legal capacity."

The property from her mother's estate was large. The interests from those of her brother and sister insignificant. Which is more reassurable to suppose, that a lawyer, drawing this will, and realizing the necessity of referring to the power, should use these words as such a reference, and 65
that they should be so adopted by the testratrix, *or* that this lawyer should deem it necessary to state a provision of the Public Statute law of the State?

She then goes on to describe herself as "the wife of Thomas G. Clemson," following again the exact words of her mother's will and says:

"Being of sound and *disposing* mind, memory and understanding, do make this my last will and testament, in manner following:"

"I will, devise and bequeath *the entire* PROPERTY *and estate*, to which I am now *in anywise entitled*, and which I 66
may hereafter acquire, of *whatever the same may consist*, to my beloved husband, Thomas G. Clemson, *absolutely and in fee simple*."

And in case she survives her husband, or he dies intestate, then she devises it over to her granddaughter, Isabella Lee. She appoints her husband executor, and the will is "*duly executed by her*."

That is her will. Now, bear in mind the circumstances. 67
Let the Court "place itself in the position occupied by this testatrix when she made this will, and from that standpoint *discover what she intended*."

As we have seen, the ardent wish of both her husband and herself was to found at Fort Hill an Agricultural College, as a monument to her father and her son. To that end they had devoted their joint property, and to carry out this purpose had made mutual wills, similar in tenor, the survivor to carry out the joint purpose.

Outside of the interest in the bond and mortgage on 68

Fort Hill, to which she was entitled under her mother's will, Mrs. Clemson had practically nothing. Her interest in her brother's and sister's estate mentioned in the will together was less than $600.

But she refers expressly to the "*legacies*" left her by her mother's will. If the will was not an execution of the power therein conferred, then all that it could pass as coming under that will, specially referred to by Mrs. Clemson, was "*an oil portrait of her grandmother.*" Will any
69 Court, or anybody for a moment gravely hold, that when Mrs. Clemson says that she "is entitled to legacies under the last will of her mother, * * and notwithstanding her coverture, has full power to dispose of the same," and then devises all the *property* that she is "in anywise entitled to" to her husband, her well known wish being to found an Agricultural College at Fort Hill, that all this is satisfied, by the bequest of "an oil portrait of her grandmother?"

But even this constuction cannot be given. This por-
70 trait was left to Mrs. Clemson by her mother in 1866. Her husband's marital rights attached immediately, and it became at once his property and was not her's to will.

Our friends say she means such income or interest as she may have derived from this property during her life. But this cannot be properly described as "legacies to which she was entitled." True it constituted the interest of her legacy. But once having received it, it became then *her* property, *her* estate. It was severed from her mother's
71 estate, and under no possible construction could we include this income which she had already reduced to possession as her own, under the phrase "legacies to which I am entitled."

And yet there are but three constructions to give this will, as to this part of it. Either,

1. All this preamble, and these words mean nothing. And a Court will never hold such a construction.

2. Or, they only go to pass this oil portrait. And such a construction is not only ridiculous, but contrary to law, the
72 portrait then belonging to Mr. Clemson already.

3. Or it was *intended, and is*, an execution of the power conferred by her mother's will, and the effect was, and is, to pass to her husband the entire three-fourths interest in the bond and mortgage, afterwards, and now, represented by the Fort Hill place, and any other "*legacies*" or "*property*" to which she was entitled, or over which she had power of disposition under her mother's will.

Cotemporaneous Writings.

73 But we have, in evidence, two other instruments in writing, by Mrs. Clemson, referring to her interest under her mother's will A comparison of the terms used in them, with those used in the will, show conclusively what Mrs. Clemson meant.

The first is her letter dated January 9, 1868 addressed to her then trustee Mr. Edward Noble, written at the time of the sale of the personal assets of the estate of A. P. Calhoun.

This was evidently prepared by a lawyer. In it she says, 74

"The sale to take place to-day at Fort Hill, of personal property of my deceased brother Andrew, is largely to be applied to the bond and mortgage debt, *three-fourths of which comes to me by the will of my mother*. * * The estate of the mortgagor, will not be able to satisfy this debt. * * By my mother's will, I am authorized to direct the investment of MY LEGACY, with your consent. I therefore direct * * you to buy at the sale to-day * * such articles * * as in your judgment, * * will justify the investment." (Folio 12.)

The second is the instrument referred to in the Circuit Decree, appointing Mr. Clemson trustee in place of Mr. Noble. It bears date 13th December, 1871, a little over two months after the date of the will. From the similarity 75 of the expressions used, it was evidently prepared by the same lawyer that prepared the will. In this paper she says,

"Whereas by the will of the late Mrs. Floride Clemson, * * the undersigned Anna M. Clemson * * is ENTITLED TO CONSIDERABLE LEGACIES, the title of which is by the will vested in Edward Noble.

"Now be it known, that in accordance with the power in me vested * * I, Anna M. Clemson, * * do hereby nominate and appoint my husband, Thomas G. Clemson, as trustee under the will, *for the* PROPERTY *therein bequeathed to me*, and also *for the* PROPERTY *bequeathed me* in the codicil, in the place and stead of the said Edward Noble." (Folio 14.) 76

Here then we have absolute evidence of the terms by which Mrs. Clemson was in the habit of describing the property over which she had the power of disposition. She calls it "*legacy*," "*legacies*," "*property*" to which she says she is "*entitled*." And her mother's will used the same terms.

When then we turn to her will, and find her using exactly the same terms, as describing this property, is it not proof conclusive, that she intended to refer, and did refer,
77 directly to the property over which she had the power of disposition.

Our friends on the other side, attempt to avoid this absolute argument, by saying that Noble was only trustee for the life estate, and ceased entirely to be trustee after Mrs. Clemson's death. And that therefore in all these papers she was referring only to her life estate.

We answer

1. That it is absurd to think of a person making a will
78 of a life estate.

2. That it is hardly supposable that when these papers were drawn, any such nice distinction was drawn as to the term of the trustee. They were dealing with the property, not the tenure.

3. That any such construction, is contradicted by the distinct and absolute averments of the complainant's own bill. She asks the interposition of the Court, on the ground that after the death of Mrs. Clemson, the property still remained in Mr. Clemson as trustee and under the trusts
79 of Mrs. Calhoun's will. (First Record, folio 16.)

4. It is also contrary to the principle laid down in the interlocutory order of injunction, conferred by the Circuit Court, maintaining the jurisdiction on the very ground that the legal title remained in Clemson, as trustee, under Mrs. Calhoun's will, after his wife's death. (First Record, folio 68.)

We are therefore confirmed by the light of these cotemporaneous instruments in writing, that in Mrs. Clemson's will, there is both a reference to the power, and also to the
80 property, the subject of the power.

Circumstances at Mrs. Clemson's Death.

This will was made 29th September, 1871. Mrs. Clemson died on the 12th September, 1875, four years after, leaving it in full force and unchanged.

Was there any material change in her circumstances? None.

The sale under the foreclosure decree had taken place, 1st January, 1872. Fort Hill had been bought. She and her husband had entered into possession of, and were living on it as their home. They had partitioned in 1873, to Isabella Lee, her one-fourth, presumably on the demand of her father and guardian. They held the remaining 814 acres, as representing that *legacy*, to which Mrs. Clemson was *entitled* under her mother's will. 81

The estates of Cornelia and Patrick Calhoun had been settled. She had received $403.37, in 1872, as her interest in the former, and in May, 1875, $150, as her interest in the latter, $553.37 as her interest in both. She told Mrs. Cornish, "that she got very little from her sister and brother." She, therefore, knew they were settled up. (Folio 57.) 82

She had been receiving her annual income from the Boisseau trust and spending it. The rent and income from the farm, *if there was any*, was consumed in living. She and her husband were evidently not flush of ready money, and were, therefore, not putting up this magnificent income of $230 or $270 per annum, because Mrs. Sallie Calhoun says they "tried to get her to try and sell some pictures" for them which they had brought from Europe. (Folio 72.) 83

Meantime, her interest in the Educational Institution continued unabated. It was the theme of her conversation. And as late as August, 1874, she selected a committee, who issued an address to the State, to organize, if possible, such an Institution at Fort Hill. Their plans varied. At first, she and her husband proposed to donate part, and sell the rest. Afterwards they decided to give the whole. (Folio 60.)

And when she died she exacted from her husband his promise that he would never sell or alienate Fort Hill, but 84

would see that it went to the State for an Agricultural College. She died with this promise from him, which he has faithfully kept. (Folio 59.)

At her death no one knew of her having any property except Fort Hill. Her relatives, her intimate friends, her neighbors, all those in position to know, and who would have known, have testified that she had nothing else. Her husband's executor and confidential friend testifies, that a
85 careful examination of all her papers shows nothing else, and that her husband admitted receiving nothing else from her estate. We have seen that she had nothing else to leave. (Folios 43, 52, 54, 57.)

The will, being one of personalty, under the general rule, speaks from the death. But at her death Mrs. Clemson had nothing except the property over which she had the power of disposition. If then this does not pass the will is absolutely inoperative.

86 *Title after Mrs. Clemson's Death.*

Her husband lived on the place, claiming it as his own, a claim never contested. He made overtures for donating it to the State, and at his death he fulfilled the promise he had made to his wife, and made his will devising it to the State for the Agricultural College she so earnestly desired to see founded there.

He was not unmindful of his granddaughter. The legal
87 title to Fort Hill was in him. He could do with it as he pleased. But to remove any occasion for disappointment at the execution of the power by her grandmother, he bequeathed her all his silver plate, silver, pictures, and other legacies, and $15,000. Was this a full equivalent for Fort Hill? (Folio 22.)

In 1854, when Mrs. Calhoun and Cornelia Calhoun sold the entire tract to A. P. Calhoun on credit, the price was $15,000. (Folio 5.)

In 1872, when the entire tract was sold under foreclosure,
88 it was bought in at $15,000. (Folios 6–10.)

In 1888, Mr. Gideon Lee, in his remarkable letter to The News and Courier, values the present tract, 814 acres, at $10,000. (Folio 67.)

In 1888, the appraisers of Mr. Clemson's estate appraised the present tract, 814 acres, at $15,000. (Folio 29.)

Mr. Clemson therefore gave to his granddaughter its full money value in his will. And she attaches no other value to it, for she has agreed to sell it as soon as she recovers it—*if she does*—to Mr. Patrick Calhoun, one of the retained counsel in the case. 89

Mr. Clemson's title to it has never been questioned until this suit. The present issue is a latter day discovery.

Points at Law.

We come back then, after all this examination, to the question: Did Mrs. Clemson, by her will, intend to, and did she execute the power conferred upon her by the will of Mrs. Calhoun?

We think that the answer from the facts of the case is 90 conclusive, in the affirmative; so much so that citations of cases are unnecessary. But to show that we are supported by the authorities, we will now consider the question in the light of adjudicated decisions.

From these decisions we extract the following general principles which have been laid down by the Courts, as proper for their guidance in cases like the present.

1. A will must be construed in the light of circumstances surrounding the testator.

91

We have already quoted from the decision of this Court in Blake vs. Hawkins, 98 U. S., 324, where the Court lays down the rule that

"When interpreting a will, the attending circumstances of the testator, such *condition of his family, and the amount and character of his property, may and ought to be taken into consideration.* The interpreter may place himself in the position occupied by the testator when he made the will, and from that standpoint discover *what was intended.*"

And we have also quoted from Judge Sharswood to the same effect in Postlethwaite's Appeal, 68 Pa. St., 381. 92

The same principle is recognized in South Carolina. In Clark vs. Clark, 19 S. C., 348, the Court says:

"In the construction of a will, of course the main object should be to ascertain the intention of the testator, but that intention must be gathered from the will itself, *assisted by the light of the circumstances surrounding the testator at time of its execution.*"

In Scaife vs. Thomson, 15 S. C., 357, the Court says:

"In ascertaining the subject of a testator's disposition, the Court may
93 inquire into the situation of his estate, and into *every material fact* which is auxiliary to the just interpretation of his words, for the purpose of identifying the thing intended by the words employed."

See, also,

Ladd vs. Ladd, 8 How., 10.
Crane vs. Morris, 6 Peters, 605.
Kelly vs. Jackson, 6 Peters, 622.

2. The intention must govern, not technical words.

94 The cases on the construction of wills made in execution of powers vested in the testator are innumerable. Many of them are in direct conflict. At first the rules of construction were exceedingly strict. But it was soon found that it would not do to adhere to such rigidity, and finally, the Courts have settled down to the rule that the intention of the testator, however ascertained, must govern even against the technical meanings of the words used.

95 This question is fully discussed by Judge Story in Blagge vs. Miles, 1 Story, 445. In fact, the whole subject of the execution of a power by a will, is so fully and learnedly exhausted in the opinion of that able jurist in that case, that we would fain adopt it as our argument in this. We ask its careful examination by the Court. It is the best exposition of the subject we have seen, and is expressly referred to and approved by the Supreme Court of the United States in Warner vs. Connecticut Co., 113 U. S., 366, and by that of South Carolina in Bilderback vs. Boyce, 14 S. C., 528.

96 On this point Judge Story says:

"There was a long struggle in Westminster Hall upon the point whether in wills, the intention of the testator, as gathered *ex visceribus testamenti*, was to be followed in the interpretation of devises, or, whether the technical construction of law, given to certain phrases, was to prevail over the intention. That struggle, at least, since the decision in Perrin vs. Blake, (4 Burr R., 2,579; Fearne on Conting. Rem. by Butler, 9th edit., p. 161), seems to have terminated. It is now admitted to be established, as the general rule, that *the intention of the testator is the pole star to direct the Court* in the interpretation of wills, and that *technical words and set phrases are controlled by, and, do not control, that intention, when clearly expressed or positively ascertained.* The consequence is, that decisions upon particular wills are of far less consequence now, than they were formerly supposed to be: unless, indeed, where the leading provisions are almost identical, and the facts substantially alike. They now furnish, not so much authorities, as analogies, by which to interpret the words of wills in new cases. 97

"I apprehend, that similar doctrines now generally prevail in regard to the execution of powers, and especially in regard to their execution by last wills and testaments. The main point is, to arrive at the intention and object of the donee of the power in the instrument of execution; and that being once ascertained, effect is given to it accordingly. The authorities upon the subject may not all be easily reconcilable with each other. But the principle furnished by them, however, occasionally misapplied, is never departed from, *that if the donee of the power intends to execute, and the mode be, in other respects, unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative.*" 98

Such is the rule in nearly all the States.

"The testator having explained his own meaning in the use of these terms, I shall take that as my guide *without resorting to lexicographers to determine what the same terms ought to mean in the abstract, or to adjudicated cases to discover what they have been decided to mean under other circumstances.*"

Carnagy vs. Woodcock, 5 A. M. D., 2 Munford, Va., 470.

"There is no other class of instruments known to the law, in which so little importance is to be attached to the technical sense of language, in comparison with that sense in which the apparent object of the writer indicates his words to have been used." 99

Funk vs. Egleson, 34 Am. R., p. 136.
Citation from p. 432.

"All technical rules of construction must yield to the expressed intention of the testator if such intent be lawful."

Peck's Appeal, 78 Penn., 432.

"Technical rules of construction are not to be applied to defeat the plain intent of the testator."

Still vs. Spear, 45 Penn., 168. 100

"In determining whether a word is used in a will in a technical or more general sense, *it is to be considered which will best effectuate the testator's intention.*"

Drew vs. McMurtie. 15 N. I. L., 276.

And such also is the rule laid down in the Supreme Court of the United States.

In Turlay vs. King, 3 Peters, 377, the construction of a will was before the Court, and it says:

"This will provides 'in case of having no children, I then leave and be-
101 queath all my real estate, at the death of my wife, to William King, son of my brother, James King, on condition.'" etc.

"These words certainly import that the whole estate should vest in possession at the same time, and mark with precision when that time shall be. This express provision can be controlled only by a strong and manifest intent to be collected from the whole will. But the intent of the testator is the cardinal rule in the construction of wills; and if that intent can clearly be perceived, and is not contrary to some positive rule of law, it must prevail. *although in giving effect to it some words should be rejected, or so be restrained in their application as materially to change the literal meaning of the particular sentence.*"

And the Court proceeds to examine into the whole will,
102 and into the circumstances surrounding the testator, to ascertain his intention and give it effect, over the technical meaning of the words used.

In fact, the Courts hold the execution good, if the intention to execute be clear, whether technical words are used or not. And the English Courts have held that

"*No technical words are necessary to render the execution of a power effectual, if the intention be clear;* and the instrument creating the power need not be referred to."

103 Maundrell vs. Maundrell, 10 Vesey, 246-258.

Sir Edward Sugden, in his treatise on Powers, discusses this point fully and at length, with reference to many cases. He sums up as his conclusion (vol. 1, p. 402):

"*There is no magic in words.*"

It must also be borne in mind, that in considering such cases,

"The leaning of the Court is strongly in favor of the execution of the power if it can be supported."

104 Warner vs. Howell, 3 Wash. Cir. Ct., 14.

3. Courts in construing wills not bound by adjudicated cases.

While Courts consult decided cases, still they do not consider them as binding authority, unless the wills in both cases, and the surrounding circumstances are exactly alike.

"Cases in wills may guide as to the general rules of construction; but unless a case cited to, be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the Court, who always look upon the intention of the testator as the polar star to guide them in the construction of wills." 105

Jelling vs. Poyntz, 3 Wills, 141, 1 A. D., 435.

As is well said by Dallas, C. J., in Doe vs. Gilbert, 3 Brod & B., 85: "Every case of this sort depends on its own peculiar circumstances, for in every case the question is one of construction—to be made on the whole of the will. Every case, therefore, is individual."

Says J. Bullen in Smith vs. Coffin, 2 H. B. L., 444:

"Cases of this sort depend on notices of expression, and sometimes on a single word; and as it has been frequently said, the nonsense of one man cannot be a guide for that of another. But the question must always be, what was the intention of the testator? That is the polar star by which he must be guided." 106

In Badelley vs. Leppingwell, 3 Bur., 1533, Judge Wilmot said:

"That cases on wills serve rather to obscure than to illuminate."

In Canady vs. Jones, 19 S. C., p. 305, the Supreme Court lays down the rule in South Carolina, saying:

"In the first place we must remember that while a decided case may aid us in ascertaining the rules, unless it is in every respect like the one under consideration, which rarely happens, it cannot be allowed to have a controlling effect, inasmuch as the object should be, in every case, to ascertain the intention of the testator from the words which he had used, and unless the language to be construed is identical in both cases, though it may aid us in reaching a proper conclusion, cannot be regarded as absolutely controlling." 107

4. Rules by which Courts ordinarily discover intention.

Subject to the foregoing we submit the following as containing the general principles which have been recognized 108

by the Courts as aids in ascertaining the intention of the testator.

These general principles are perhaps as clearly expressed by Judge Story, in Blagge vs. Miles, *supra*, pp. 446–7–8, as by any one. He says:

"All the authorities agree that it is *not* necessary, that the intention to execute the power *should appear by express terms or recitals in the instrument. It is sufficient that it shall appear by words, acts, or deeds, demonstrating the intention.*

109 "Three classes of cases have been held to be *sufficient demonstrations of an intended execution of a power:* (1.) Where there has been some reference in the will, or other instrument, to the power; (2d.) or a reference to the property, which is the subject on which it is to be executed: (3d.) or where the provision in the will, or other instrument, executed by the donee of the power, would otherwise be ineffectual, or a mere nullity; in other words, it would have no operation, except as an execution of the power. It seems unnecessary to refer at large to the cases which establish these propositions.

"Lord Chief Justice Best has put these classes of cases upon the true ground. They are instances of the strong and unequivocal proof required to establish the intention to execute the power; *but they are not the only cases. On the contrary, if a case of clear intention should arise, although not falling within the predicament of these classes, it must be held, that the power is well*
110 *executed, unless Courts of Justice are at liberty to overturn principles, instead of interpreting acts and intentions.*

"It is open to inquire into the intention under all the circumstances, which seems to me to be the true and sensible rule upon the subject, and when that intention is thus once ascertained, it governs. So it was expressly held, in Pomeroy vs. Partington, (3 Term R., 665;) and in Griffith vs. Harrison, (4 Term R., 737, 748, 749,) the Court expressly repudiated the notion, that any technical exposition was to be given to the words of a will, executing a power, and held, that the intention was to be collected from the words, according to the ordinary and common acceptation thereof. And again, in Bailey vs. Lloyd, (5 Russ. R., 330, 341,) the Court held, that the question of the execution of a power by a will, was a mere question of intention, and that intention was to be collected, not from a particular expression, but from
111 the whole will."

In the very able opinion of the Supreme Court of Illinois, in the case of Funk vs. Egleson, 92 Ill., 515, cited and approved in Warner vs. Connecticut Co., 109 U. S., 366, the Court says, referring to these rules for ascertaining intention:

"At all events, the rule which requires the existence of one of these three elements, in order to effect an execution of the power, *is altogether subordinate and secondary in its character, and if circumstances could and should arise that indicated clearly the intention of the donee to work by the power, it could not be but that the*
113 *artificial rule, predicated upon former experience, must give way, and the primary*

and fundamental rule, which requires only that the intention be made clear and manifest, would prevail.

"It is evident the one rule is based upon principle, and is substantial, while the other is artificial and based upon past experiences, and it is at least within the range of possibility that *future experience may develop exigencies that the past has not*, and demand a recurrence to the fundamental rule. Not only so, but we are strongly impressed that these exigencies, which are possible in the future, have to some considerable extent occurred it the past, and have afforded occasions for criticisms such as we have quoted, and for nice and subtle distinctions, and for refined reasoning, in order to effectuate the intention of the donee of the power, and at the same time, on some theory, plausible, if not substantial, bring the case with one or another of the three classes referred to."

These principles have been recognized everywhere. We could multiply citations. We prefer to refer to the latest cases decided in the Supreme Courts of the United States, and of South Carolina. 113

In Warner vs. Connecticut Co., 109 U. S., 366, decided in 1883, the citations are so full, that we ask leave to extract them bodily from that decision. There the Court was considering whether the instrument before it was or not an execution of the power. And it says:

"The rule applicable in such cases, it is claimed, is that deduced as the doctrine of Sir Edward Clere's case, 8 Rep., 17 b, as stated by Sugden on Powers, 417, 7th London Ed., that 'where the disposition, however general it may be, will be absolutely void if it do not enure, as an execution of the power, effect will be given to it by that construction.' Mr. Chance, however, says: 114

"'There are, indeed, in the case dicta apparently to this effect, that if the instrument refer not to the power, and can have some effect by means of the interest of the party, though not all the effect which the words seem to import, still the instrument shall not operate as an execution of the power, the intention being thus contravened. It appears quite clear, however, at this day, and a reference to the authorities will, it is apprehended, show that *it has been considered clear for nearly two centuries, that the rule is not thus confined; indeed, it may well be asked why, admitting that the intention can be discovered to pass all, the intention should not prevail in the one case as well as in the other?* What rule of law or construction would be thereby violated." (2 Chance on Powers, 72, 1597, London Ed., 1831.)

"And Sir Edward Sugden said:

"'And notwithstanding Sir Edward Clere's case, an intent, apparent upon the face of the instrument, to dispose of all the estate, would be deemed a sufficient reference to the power to make the instrument operate as an execution of it, inasmuch as the words of the instrument could not be otherwise satisfied.' 2 Sugden on Powers, 412, Ch. VI., Sec. VIII., 7th London Ed. 115

"The Supreme Court of Illinois, in the case of Funk vs. Eggleston, 92 Ill., 515, had the question under consideration, and in a learned opinion, in which a large number of authorities, both English and American, is reviewed, discarded even the modified English rule of later date, and adopted and formulated by Mr. Justice Story, in Blagge vs. Miles, 1 Story, 426, as follows:

"'The main point to arrive at is the intention and object of the donee of the power in the instrument of execution, and that being once ascertained, effect is given to it accordingly. If the donee of the power intends to execute, and the mode be in other respects unexceptionable, that intention, *however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative.* I agree, that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful, under all the circumstances, then that doubt 116

will prevent it from being deemed an execution of the power. All the authorities agree *that it is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument. It is sufficient that it should appear by words, acts or deeds demonstrating the intention.*'

"The rule, as adopted by this Court, was tersely stated by Mr. Justice Strong, in delivering its opinion in Blake vs. Hawkins, 98 U. S., 315-326, in this form:

"' *If the will contains no expressed intent to exert the power, yet, if it may reasonably be gathered from the gifts and directions made that their purpose and object were to execute it, the will must be regarded as an execution.* After all, an appointment under a power is an intent to appoint carried out, and if made by will, the intent and its execution are to be sought for through the whole instrument.'

"In the case of Munson vs. Berdan, 8 Stewart, (N. J.,) 376, it is said:

"' *It is sufficient if the act shows that the donee had in view the subject of the power.*'

"And in White vs. Hicks, 33 N. Y., 383-392, Denio, Ch. J., said:

117 "'This doctrine proceeds upon the argument, that by doing a thing which, independently of the power, would be nugatory, she (the donee of the power) conclusively evinced her intention to execute the power.'

"And in Sewall vs. Wilmer, 132 Mass., 131-134, the Supreme Judicial Court of Massachusetts, in reference to a will made in Maryland, which was the domicil of the testatrix, but the provisions of which related to both real and personal estate situated in Massachusetts, held it to be a valid execution of a power contained in the will of her father, whose domicil was in that State, although it would have been otherwise held in Maryland, Gray, C. J., said:

"'But in this Commonwealth the decisions in England since our Revolution, and before the St. of 7, Will. IV., and 1 Vict., Ch. 26, Sec. 27, have not been followed, the Court has leaned toward the adoption of a rule enacted by that Statute as to wills thereafter made in England, namely, that a general devise or bequest should be construed to include any real or personal estate of which the testator has a general power of appointment, unless a contrary intention should appear by his will; and it has been adjudged that the mere facts that the will relied on as an execution
118 of the power does not refer to the power nor designate the property, subject to it, and that the donee of the power has other property of his own upon which his will may operate, *are not conclusive against the validity of the execution of the power, but that the question is, in every case, a question of the intention of the donee, taking into consideration not only the terms of his will, but the circumstances surrounding him at the time of its execution,* such as the source of the power, the terms of the instrument creating it, and the extent of his present or past interest in the property subject to it."

In Boyd vs. Satterwhite, 10 S. C., 52, the Court, in determining whether a will was an execution of a power, confines these principles, citing the authorities, as follows:

"Sir William Grant said it was always a question of intention, whether the party
119 meant to exercise the power or not.

"*All that is necessary is that the intention to execute the power should clearly appear in writing.*

"If the donee of a power *either refer to the deed out of which the power arose, or describe the property over which he has a power of disposition, it is sufficient to prove the intention.*"

In Bilderback vs. Boyce, 14 S. C., 538, the question was whether a power was duly executed by a will in general terms, disposing of the whole estate of the donee of the power, *without any reference to the power, or the property, and where the donee's own property satisfied the*
120 *terms of the will.* The Court, after examining the will and

the surrounding circumstances, held there was no intention manifested to execute the power. But the Court says that without going through all the cases, it adopts the rules laid down in Doe vs. Roake, and says:

"In that case it was solemnly decided the *Court would infer an intent to execute a power* only in three cases: *First.* Where there was some reference in the will or other instrument to the power. *Second.* Or reference to the property which is the subject on which it is to be executed. *Third* Or where the provision in the will would have no operation except as an execution of the power. According to this canon of interpretation, the power in this case was clearly not executed. The Merchants' Hotel is not mentioned in the will of Samuel J. Boyce, nor is the power referred to, and the terms are satisfied by the property which he left, without including that as to which the power existed." 121

And later on, the Court says, p. 540:

"In most of the States of the Union which have no legislative enactments on the subject, there has been, as we understand it, a general acceptance, with some modifications of the rule followed in the English Chancery. These modifications, for the most part, *are upon the point of allowing proof of the circumstances under which the will was executed, so as to allow it to be read in the light of those circumstances.* The cases are not in accord, and we will not encumber this opinion by referring to them. *If there can be said to be a distinct American doctrine upon the subject, we do not know that it is anywhere better stated than by Judge Story in Blagge vs. Miles,* 1 Story, 426, cited in a note to 2 Eq. Jur., § 1062. In that case the rule of construction before referred to was stated, and the Judge, in commenting, says: 'The authorities on this subject may not all be easily reconcilable with each other, but the principle furnished by them, however occasionally misapplied, is never departed from, that if the donee of the power intends to execute the power, *that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative.*'" 122

And the same principle is affirmed in Moody vs. Tedder, 16 S. C., 564.

So is the rule generally.

Sugden on Powers, Volume 1 (371).
Farwell on Powers, 155–156. 123

5. Are the words "estate," etc., sufficient to pass property the subject of a power.

Here there has been considerable discussion, and some conflict. A careful and thorough examination of the cases leads to the deduction of the following principles:

(*a*) A devise "of all my estate, of any kind, real or personal," or similar words occurring *alone*, in a will in which there is no reference whatsoever to the power, nor to the 124

property the subject of the power, and when the testator has ample estate to satisfy the will without calling in the property covered by the power, and when there are no surrounding circumstances to make good the intention, will not amount to an execution of the power.

(*b*) But when the will refers to the power, or to the property covered by it, or the Court is satisfied from the whole will and the surrounding circumstances, that the intention was to execute the power, then these words are deemed sufficient.

125 This is but a corollary to the rule, that when the intention is ascertained, it will be carried into effect without reference to technical words.

A leading instances of the first class in Bilderback *vs.* Boyce, 16 S. C., 537, already cited. Then the donee of the power made a will, in which after certain specific devises, he gave "all the rest and residue *of my estate whatever and wherein.*" The will made no reference to the power, nor to the property the subject of the power, and he possessed

126 ample estate, real and personal, to satisfy the will.

The Court considers the question whether the property subject to appointment "as a part of his '*estate,*' in such sense that under that description *alone* it would pass under the will." And after full discussion of the difference between "property" and "power" holds that it did not. But the opinion shows that if there had been any reference to the power, or the property, these words would have been held sufficient to pass the property.

127 So in Bradley *vs.* Westcott, 13 Vesey, 452, where the words, "all *my* estate," "all *my* personal estate," "all *my* interest and estate therein," were held standing *alone*, and without more to be insufficient to pass the property covered by the power. That the words "*my* estate" would hardly impute an intention to act on the estate of another.

So in Roach *vs.* Hayne, 8 Vesey, 588, under the words "*my* estates and effects," and "*my* personal estate," stand-

128 ing alone, the property covered by the power could not pass.

That a person having a power to dispose of the personal estate of another, could not pass it under such a description.

Numerous similar cases can be cited, in all of which, however, as in those above, there was ample property to satisfy the will without resort to that covered by the power, and there was no reference in the will either to the power or the subject of the power.

Instances of the other class of cases are also numerous.

In Boyd vs. Satterwhite, 10 S. C., 54, the words were: "The tract of land, as far as I may have my legal interest." She had an absolute interest in one-half, and a power of appointment over the other of this tract. But the Court held that there had been a reference to the property, and that there was evidence of an intention to convey. They therefore gave effect to the intention, and held these words, or their equivalent, "interest in land," were sufficient to pass that covered by the power. 129

In Hopkins vs. Mazyck, Rich. Ch. cases, (S. C.,) 269, the words of the will were, "the residue of my slaves, including those derived under the will of my father," "the residue of my estate, real and personal, whatsoever and wheresoever, including any estate, real or personal, not herein before particularly devised and bequeathed, which I have derived under the will of my father." The father had devised certain property to trustees in trust for his son, the testator, during life, with power of appointment. The testator left an estate of his own, in addition to the property conveyed by the power. The Court says: 130 131

"The intention to execute the power of appointment, by devising the whole estate in the land, is most obvious," and they held that the intention prevailed and the property passed.

In Moody vs. Tedder, 16 S. C., 558, property had been devised by Wm. Griggs to his widow during the term of her natural life only, with power to dispose of so much as she deem proper, and in such manner as she may see fit. She made a deed of "*all my interest and life estate* in and to all and singular, the lands and other property left to me for life, by the last will of Wm. Griggs." 132

The question was whether it was an execution of power, or merely a conveyance of the life estate. The Court held it an execution of the power, saying:

"No reference in terms is made to the power of disposing, but beside the life estate she had no other 'interest' in the property, and there is express reference to the property as to which the power existed. It may be that the word 'interest' was not the technical term to express the idea of a power, but in the ordinary acceptation of the word, it was broad enough to cover it, and we think the deed was intended to include the power. The question of the execution of a power is always one of intention, and if the devisee of the power intends to execute it, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. Bilderback vs. Boyce, 16 S. C.

133

In Blake vs. Hawkins, 98 U. S., 326, there was a reference to the power in the introductory part of the will. The will then proceeded to give pecuniary and residuary legacies, without using any of the technical terms usually deemed proper and necessary, where the intention is to appoint property to another. But the Court, considering all the circumstances of the testratrix, held that she had intended to execute the power, and that the will was in fact a good execution.

134

In Attorney-General vs. Wilkinson, 2 Eq. Cases, L. R., 815, the donee of a power, by will gave and bequeathed "*all my property and estate*, whatsoever and wheresoever and of what nature, kind, quality, soever the same may be." There was no other reference whatever either to the power, or to the subject of the power. It did not appear that she had any other property. And the Court held that this implied an intention to execute the power, and that the property covered by it passed under the terms of the will, giving effect to the intention as against the strict technical meaning of the words.

135

In Standen vs. Standen, 2 Vesey, 589, the donee of the power by will, "gave all the residue of my estate and effects which I may die possessed of, interested in, *or entitled to*, at the time of my decease." It was held that the will was an execution of the power; that the intention was manifest, and was made clearer by the fact that she had no other real estate than that covered by the power. Therefore the intention prevailed.

136

And the case is cited and approved in Sugden on Powers, Vol. 1, p. 378.

So in Farwell on Powers, p. 154, the rule is thus stated:

"In Wildbore vs. Gregorie, 12 Eq., 482, V. C. Bacon said that a testator cannot be considered, by using the words, '*my* property,' to have intended to deal with property over which he had a limited power of appointment, when there was property of his own, to which the words, giving full effect to them according to the terms of the will (exclusively of the instrument which created the power), would apply.

137 "But if there is a reference to the power, and the will purports to be made in pursuance of the power, it is not necessary to describe the property, but the expression, 'my personal estate,' is sufficient. If a testator, possessing a power, say, 'by virtue of a power I make my will,' and then say, 'I give all my money,' this would be a sufficient execution. Harvey vs. Stracey, 1 Drew, 113."

See numerous other cases cited in Farwell on Powers, 150–183, and in Sugden on Powers, Sec. VII.

In Blagge vs. Miles, 1 Story, 456, already cited, the donee of the power specifically devised as "my house and land," 138 a piece of real estate, describing it, and constituting part of the property over which she had power of disposition. She then devised "all the rest and residue of my estate of every nature and kind." The question was whether this was an execution of the power as to the balance of the property covered by it. But Judge Story says:

"When I see that Mrs. Blagge has, in the preceding clause of the will, executed the power, specifically, over certain real estate within the scope of the power, calling it 'my house and land,' and then immediately adding, 'all the rest and residue of my estate of every nature and kind,' it is plain to 139 me, that she contemplated all the real estate within the scope of the power, as her own estate, and subject to her own absolute disposal, and that she intended to dispose of all of it by her will, by the very words which she used. I am not bold to fritter away such an intention, coupled with such acts, by resorting to any technical niceties and refinements. They partake too much of subtlety, and artificial distinction, (and I say it with the utmost deference for other judgments,) to suit a just or even a reasonable administration of private justice.

Just one other citation.

In Monk vs. Mawdsley, 1 Sim., 286, quoted by Sugden, Vol. 1, (p. 364,) the rule is laid down: 140

"Where the introductory words in a will purport that the will is made only by force of the power, every clause is to be referred to the power, if that construction is necessary to effect the intention."

By what Rule is this Case Governed.

Our friends maintain vigorously that this Court is bound to consider this will according to the decisions of the Supreme Court of South Carolina, as "a rule of property" governing the case.

141 And they then affirm, with equal vehemence, that the case of Bilderback vs. Boyce, 16 S. C., 537, is the rule in South Carolina, and that it is conclusive of this case against the defendant.

As to the last point, we have already referred to Bilderback vs. Boyce, and shown that it is not adverse to our position. And we confidently assert that when the other decisions of the Supreme Court of South Carolina are considered, it will be found that they are in line with the decisions of this Court and others, and sustain our position
142 entirely, that mere technical terms yield to the ascertained intent. We refer to

Boyd vs. Satterwhite, 10 S. C., 54.
Hopkins vs. Mazyck, Rich. Ch. Cases S. C., 269.
Moody vs. Tedder, 16 S. C., 558.

But even if we are wrong in this position, as to the law in South Carolina, we deny the correctness of our friend's position, that this Court is absolutely bound by these decisions as a rule governing the transmission of property.

143 Counsel cite as their authority for this position:

Jackson vs. Chew, 12 Wh., 153.
Henderson vs. Guffin, 18 How., 497.
Sugdon vs. Williamson, 24 How., 427.
Orvis vs. Powell, 98 U. S., 176.

But every one of these were cases of real estate, and in every one of them the principle is limited to real property. This Court has uniformly refused to be bound by State decisions as to personal property. This has been held from
144 Swift vs. Tyson, 16 Pel., 1, to date.

Now we are construing Mrs. Clemson's will to ascertain if certain property bequeathed by Mrs. Calhoun, passes thereby. To ascertain the character of the property, whether it be real or personal, we turn to Mrs. Calhoun's will.

By Clause 4 of the Codicil, she distinctly directs that if she collects the bond and mortgage, or if Fort Hill be purchased with it, or if it be invested in any other property, such property shall be "considered and held to be in the place of, *and the same as*, the aforesaid bond and mortgage, 145
and shall pass under this codicil, as if *the same were still in the form of said bond and mortgage*." (First Record, folio 46.)

She therefore stamps it as personalty, and it was, as matter of fact, still a bond and mortgage, and personalty, in 1871, when Mrs. Clemson made her will.

There is no contention about this point. All parties agree that the property devised by Mrs. Calhoun, and the subject of the power, is personal in its character under the terms of such will. 146

We merely say, that this being so, then in dealing with it, this Court is bound by no decisions, which control its freedom of judgment.

Mrs. Clemson's Will Examined in Light of Legal Rules.

Now in the light of these rules let us examine the will of Mrs. Clemson again.

First the introductory words: "Whereas I am entitled to *legacies* under the last will of my deceased mother, Floride Calhoun." 147

We remember that Mrs. Calhoun's will speaks of "*bequests*" and "*legacies*" left in trust for her daughter for life with power of disposition, and of no other kind.

Here then is a direct and express "reference to the power," and also to "the property, which is the subject of the power," to wit: the "*legacies*" left her by her mother's will.

"And notwithstanding my coverture have full testamentary power to dispose of the same." 148

Referring to her mother's will, she is given "*power to dis-*

pose as she pleases." The reference is, therefore, express and direct to this power. As to any other property she had, she could have disposed of it by will, without any special power.

Here then we have the introductory words of the will pointing to the subject matter of the power, and to the power of the disposition itself. Now, as to the other clauses which are to be referred to the power.

149 "I will, devise and bequeath, *the entire* PROPERTY *and estate to which I am now in anywise entitled, and which I may hereafter acquire, of whatever the same may consist*, to my beloved husband, Thomas G. Clemson, absolutely and in fee simple."

Note several things. She does not use the pronoun "*my*" property and estate, which has been objected to in so many cases as negativing the idea of disposing of the property of another. She says "*the* entire property and estate to which I am in anywise entitled." She general-
150 izes property and estate, so as to include not only that which was her own, but also any other she was interested in, or had any control over. "*In anywise*," whether in my own right, or under my mother's will.

Note again. She uses the word "*property*." The other side may claim that it is an improper word in appointing. We urge that it is eminently proper, because as we have already seen it is the very word used by Mrs. Calhoun herself in describing that estate or power, or both, which she had given to her daughter.

151 In Clause 20 of her will she says, "the better to effect my intentions *in regard to the* PROPERTY *in this and the second clause given to Anna*, I appoint Edward Noble trustee," &c.

Now, when Mrs. Clemson was making her will, and she finds her mother speaking of "*the property* given to Anna," and she desires her husband to have that very *property*, would she not naturally use the same phrase, and write in her will as she did "the entire *property* to which I am now in anywise entitled?"

152 But waiving this, the other side may claim under Bilderback *vs.* Boyce, and other cases, that these words, "property

and estate," standing alone and without more would not be sufficient to pass the property covered by the power. That Mrs. Clemson did not have any "property or estate" in, but only a power over Fort Hill, and therefore those are not the proper technical words to pass it.

We refer, to the cases *contra*, where the reverse rule has been laid down.

But we refer, as absolutely conclusive, to the multitude of authority, that when the intent to execute the power is manifest, words like these are amply sufficient. 153

So then it comes back after all to the question of intention.

Did Mrs Clemson intend to execute the power, and did she do so? Did she intend Fort Hill to go to her husband? Does the entire will taken together, with the circumstances surrounding the testatrix manifest this intention? If so any technical objection to the words "property and estate" vanishes.

We submit that the intention is clearly made out by the 154
will itself. When Mrs. Clemson expressly refers to the legacies left her under her mother's will and to her power of disposition over them, what did she intend by it? Either,

1. To execute the power so referred to over such legacies, or,

2. To recite the legacies and the power for the simple purpose of ignoring it.

Will any sane person maintain the latter proposition? The testimony is that Mrs. Clemson and her husband executed their mutual wills, of similar tenor, at the same time, 155
and under the advice of counsel. Can it be pretended, that this reference to the power and the property, this use of the very terms employed by Mrs. Calhoun, was for any other purpose than of manifesting the intent, carried out in the will, of executing the power?

Leave out this property, and what does the will operate upon? Nothing. She had collected her interests in Patrick and Cornelia's estates. *She had nothing else.* All the will had to operate upon was Fort Hill. To give it operation it is necessary that it be construed as an execution of 156
the power.

That there was no other property belonging to Mrs. Clemson, has been proved. At her death she had nothing except what came to her, under Mrs. Calhoun's will.

Therefore even if we are bound by the three rules formerly laid down, every one of them is complied with. Her will refers to the power, to the subject of the power, and it must be considered as an execution of the power to be operative at all.

We therefore submit with confidence, that under her will,
157 this Fort Hill property passed in fee simple to Thomas G. Clemson, and that the legal title is now in his executor.

We have therefore shown that the legal title is not in the complainant, and her action, on the merits, must fail.

Complainant not Remainderman.

We have dwelt so fully on this point, and are so confident in our conclusion, that we merely suggest one other.

If we are wrong, and the will of Mrs. Clemson is not an execution of power, then who is the remainderman under
158 Mrs. Calhoun's will in whom the fee vests?

The limitation over is at Mrs. Clemson's death to her daughter, Floride, and if she die without issue, to her brother, Calhoun. But both Floride and Calhoun were dead at the death of the life tenant. Can the complainant claim as "issue" of Floride?

We submit that under the decisions in this State she cannot, but that the fee rests in the residuary legatees of Mrs. Calhoun, and that, if Mrs. Clemson has not executed the power, they, and not the claimant, have the legal title.

Gourdin vs. Shrewsbury, 11 S. C., 1

159

We therefore submit that in any event the complainant is not the owner and holder of this property, that she cannot recover, and the bill must be dismissed.

AUGUSTINE T. SMYTHE,
A. M. LEE,
SMYTHE & LEE,
Defendant's Solicitors.

JOSEPH H. EARLE,
160 *Attorney-General S. C.,*
Of Counsel.

FILED
MAR 17 1890

SUPREME COURT OF THE UNITED STATES.

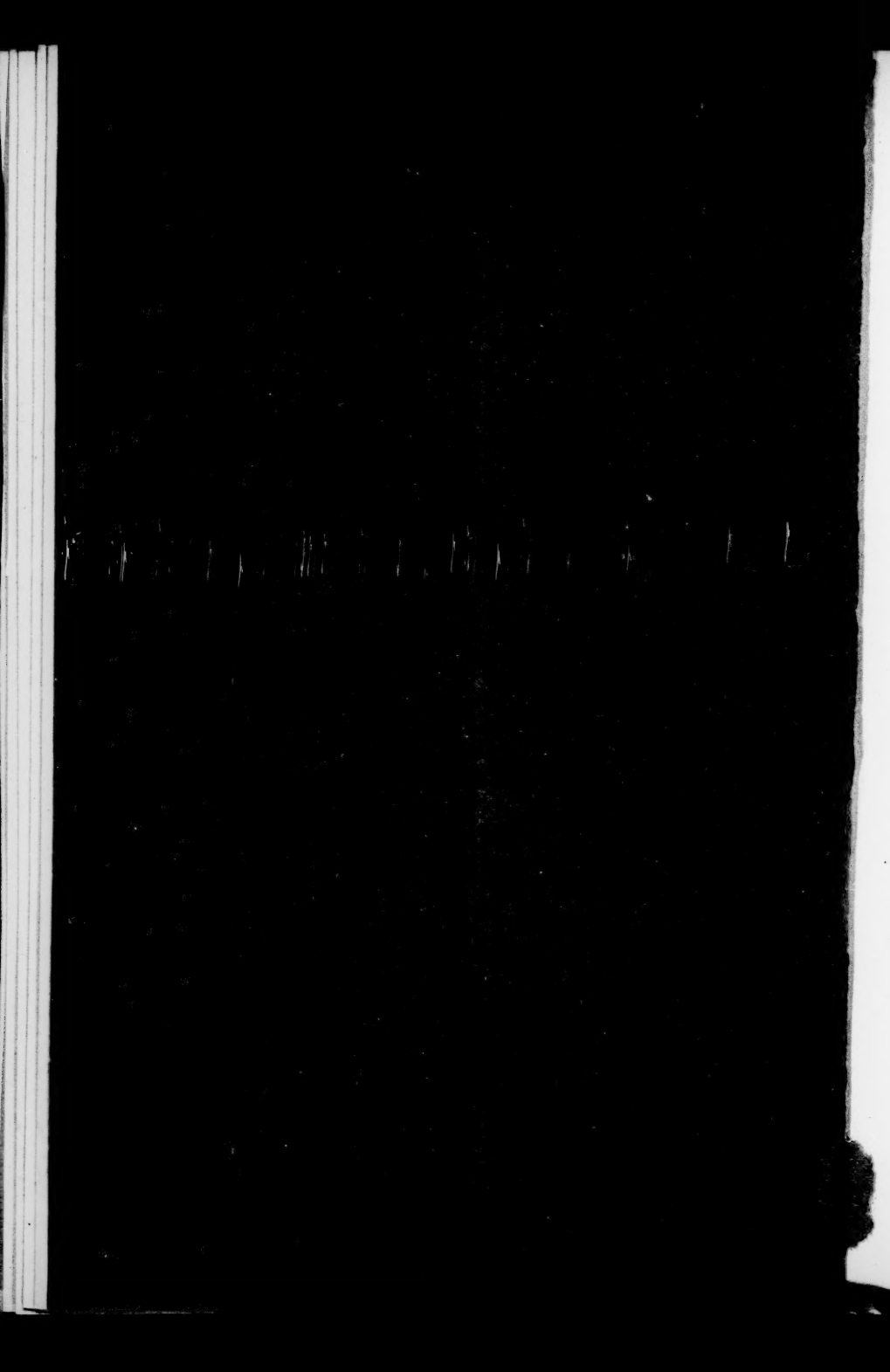
OCTOBER TERM, 1889.

NO. 1418.

ISABELLA LEE, by her next friend GIDEON LEE,
Appellant,
vs.
RICHARD W. SIMPSON, *Appellee.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF SOUTH CAROLINA.

Argument of WELLS & ORR, for Respondents.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

NO. 1418.

ISABELLA LEE, by her next friend GIDEON LEE, *Appellant*,

vs.

RICHARD W. SIMPSON, *Appellee*.

Argument of WELLS & ORR, for Appellee.

STATEMENT OF FACTS.

On June 27, 1863, Mrs. Floride Calhoun made her will, whereby she directed, first, that her debts be paid. In the second clause she gave to Mrs. Anna M. Clemson a house and lot in Pendleton and the furniture therein, for life, and at her death to her grandaughter Floride, and should Floride die without issue then over. Then she gave a number of specific legacies.

In clause 19 she says she is possessed of a large residue, consisting principally of a debt due her by her son Andrew, amounting to $40,200 for the purchase money of a planta tion known as Fort Hill, and certain personalty, which was secured by a bond and mortgage. She then declared that she was also entitled to an undivided interest in a gold mine in Georgia, and a distributive share in the estates of her son Patrick and daughter Cornelia, and some other property.

Then she directed her executors to sell all property not specifically devised, and collect the assets of her estate, and after paying the legacy to Calhoun Clemson divide the remainder in four parts.

Clause 20 is as follows: "One part being the fourth of "the residue, I give and bequeath to my daughter Anna, "during her life and for her sole and separate use. At her "death I will and bequeath it to her daughter, Floride; and "at Floride's death, if she dies without issue, I will and be- "queath it to the children of my deceased sons, John and "William, then living, equally among them, or to their issue "if they be dead; issue to represent the parents.

"The better to effect my intention in regard to the *Prop-*
"*erty* in this and the second clause, *given* to Anna, I appoint
"Edward Noble, of Abbeville, Trustee for it, and vest in
"him the legal title. Should Anna at any time wish to sell
"the house and lands in Pendleton, or all or any portion of
"the property given to her for life *the trustee*, provided it
"meets with his approval, *is authorized to dispose of it accord-*
"*ing to the wishes of my daughter*, upon having her written
"request for so doing.

"*The proceeds of such sale* the trustee shall hold subject to
"the trusts and limitations declared in reference to the
"original property. The trustee is authorized and *required*
"to *invest* the *proceeds* and also the fourth part of the residue
"herein *given to her in such property* or *in such way as she may*
"*in writing direct*; provided it meets with his approval. *The*
"*trustee is* authorized and required from time to time *to*
"*change* such *investments as often as he may be directed so to do*
"*by my said daughter* in writing; provided it meets with his
"approval, holding always the substituted property, or re-
"investments, subject to the trusts and limitations aforesaid.
"If from death or any other cause there is no trustee, or *if*
"*Anna at any time should desire to change her trustee she shall*
"*have the power so to do and to appoint another* by instructions
"in writing, under seal executed by her in the presence of
"two subscribing witnesses." *As often as she may desire to*
"*change her trustee* she shall have the power so to do, by ob-
"serving the form and solemnity above described."

On the 22nd of January, 1866, she executed a codicil, wherein she declared that the results of the war had destroyed in a great measure the wealth of the country. It was necessary to alter her will to conform to the altered condition of the country, and in clause 1 she gave the house in Pendleton to her daughter-in-law Kate and her children.

The second clause, after reciting how she had disposed of the Fort Hill bond and mortgage in her will, is as follows: "Three-fourths of my interest in said bond and mortgage "debt, amounting to about $40,200, I hereby give and be-"queath to my daughter Anna M. Clemson, to be enjoyed

"by her under clause 20 of the will, and according to the "provisions of that clause to vest in the same trustee and "to be subject to all the powers, trusts, conditions and limi- "tations of that clause precisely as the bequests therein "made were subject to them, with this exception and alter- "tion, THAT MY DAUGHTER ANNA IS HEREBY AUTHORIZED "AND EMPOWERED BY A LAST WILL AND TESTAMENT DULY "EXECUTED BY HER TO DISPOSE OF THIS BEQUEST OF THREE- "FOURTHS OF SAID BOND AND MORTGAGE DEBT AS SHE "PLEASES. If she does not thus dispose of it, at her death, "I give and bequeath it, the said three-fourths, to her "daughter Floride, and should the said Floride die without "leaving issue, I give and bequeath it at her death to her "brother, Calhoun Clemson, but nevertheless, Floride shall "likewise have power to dispose of it at her death as she "pleases, by last will and testament duly executed by her. "By clause 2nd of the will, I gave the furniture and every "article of property in my house in Pendleton, and upon "the premises, with certain reservations, and also my jew- "elry and some other small articles, to my said daughter "Anna. I now confirm to her the bequest of aforesaid fur- "niture, and all other personal property embraced in said "2nd clause, which it is my will that she shall enjoy for life "as her sole and separate estate, and at her death I give "and bequeath all this personal property to her daughter "Floride absolutely. To Anna I also give and bequeath "the oil portrait of my mother, which by clause 5th of my "will I gave to my daughter-in-law Kate."

By the 3rd clause she gave the other fourth to Floride, but if she died without issue, then over, reserving to her, however, the power to dispose of the same by will.

By the 4th clause she stamped this property irrevocably as personalty, by the following provision: "Should I at "any time collect the aforesaid bond and mortgage debt, "or any part of it, *or should Fort Hill be purchased with it*, or "the money be invested in any other property or be re- "tained in hand, *the property thus purchased*, the property "thus obtained by investment, the money thus retained,

"*shall be considered and held to be in place of* AND THE SAME "AS the aforesaid bond and mortgage, and shall pass under "this codicil as if the same were still in the form of said "bond and mortgage."

On the 13th September, 1871, Mrs. Clemson changed her Trustee by the following paper:

COPY OF CHANGE OF TRUSTEE.

"State of South Carolina, Anderson county. Whereas, "by the will of the late Mrs. Floride Calhoun, of Pendleton, "dated, June 27th, 1863, and by the codicil thereto attached, "dated 22nd January, 1866, the undersigned, Anna M. "Clemson, her daughter, *is entitled to considerable legacies*, the "*legal* title *of which* is, by the will, vested in Edward Noble, "Esq., of Abbeville County, in said State, as Trustee. By "the 20th clause of the will, confirmed by the 2nd clause of "codicil, the testatrix provides for a change of Trustee, in "the following manner, viz: 'If from death or any cause "there is no Trustee, or if Anna at any time shall desire to "change her Trustee, she shall have power so to do, and to ap- "point another by any instrument in writing, under seal, ex- "ecuted by her in the presence of two subscribing witnesses; "and as often as she may desire to change her Trustee she "shall have the power so to do, by observing the form and "solemnity above described.' And whereas the said will "and codicil are in the office of the Probate Judge for said "county of Anderson having been duly probated on the 7th "of August, 1866, and letters testamentary granted to the "said Edward Noble as Executor on the same date. Now "be it known that, in accordance with the power in me "vested by the above recited passage of my mother's will, "I, Anna M. Clemson, of the said county of Anderson, do "hereby nominate and appoint my husband, Thomas G. "Clemson, of Pendleton, Anderson County, as Trustee under "the will for the property therein bequeathed to me, and "also for the property bequeathed me in the codicil, in the "place and stead of the said Noble, who desires to be re- "lieved from the trust."

It is a noticeable fact that throughout this will and codicil the terms "give" and "bequeath" are always used, and the property taken is always spoken of as "legacies," thus showing how this property was considered by Mrs Calhoun.

The mortgage on the Fort Hill place was foreclosed and sold on 1st January, 1872, Thos G. Clemson, as Trustee of Anna, buying it, and paying off the other liens and charges thereon, amounting to $6,964.43, out of his individual property.

On the 29th September, 1871, Mrs. Anna C. Clemson, sometimes called Anna M. Clemson, made the following will:

"State of South Carolina. In the name of God: Amen! "WHEREAS, I AM ENTITLED TO LEGACIES UNDER THE LAST "WILL OF MY DECEASED MOTHER, FLORIDE CALHOUN, "and to a distributive share in the several estates of my "deceased sister, Cornelia Calhoun, and my brother, Patrick "Calhoun, and NOTWITHSTANDING MY COVERTURE HAVE "FULL TESTAMENTARY POWER TO DISPOSE OF THE SAME, "Now I, Anna Calhoun Clemson, the wife of Thomas G. "Clemson, of the town of Pendleton, in the County of An- "derson and State aforesaid, being of sound and disposing "mind, memory and understanding, do make this my last "will and testament in the manner following: I WILL, "DEVISE AND BEQUEATH THE ENTIRE PROPERTY AND ESTATE "TO WHICH I AM NOW IN ANY WISE ENTITLED AND WHICH "I MAY HEREAFTER ACQUIRE OF WHATEVER THE SAME MAY "CONSIST, TO MY BELOVED HUSBAND, THOMAS G. CLEM- "SON, ABSOLUTELY AND IN FEE SIMPLE; but should my "husband, Thomas G. Clemson, depart this life leaving "me his survivor or should he survive me and then die intes- "tate, in either event I will, devise and bequeath my entire "property and estate as well as that which I may hereafter "acquire, of whatever the same may consist, to my grand- "daughter Isabella Lee, the child of Gideon Lee, of the "State of New York, absolutely and in fee simple. I here-

"by nominate and constitute Thomas G. Clemson as Exec-
"utor of this my will."

On 5th November, 1873, partition in kind was made between Mrs. Anna C. Clemson and Isabella Lee, by which te latter received one-fourth of Fort Hill, amounting to 288 acres, which she has held ever since.

On the 12th September, 1875, Mrs. Anna C. Clemson departed this life, leaving her husband, Thomas G. Clemson, in possession of the remaining three-fourths of Fort Hill, and he continued in such possession until his death, which occurred on the 6th of April, 1888.

On the 6th November, 1886, Thomas G. Clemson executed his will, and on the 26th March, 1887, a codicil thereto, wherein he devised the said property to R. W. Simpson, his Executor, for certain uses and trusts.

The object of this suit is to have R. W. Simpson declared resulting Trustee, of Isabella Lee, on the ground that Mrs. Clemson never exercised the power of appointment conferred on her by Mrs. Calhoun's will. The leading question, therefore, is, Was Mrs. Clemson's will an execution of the power of appointment?

POINTS AND AUTHORITIES.

In the consideration of this case we desire it to be borne in mind that although it is a suit to recover realty, it is to be treated as personalty, for it has been so stamped by Mrs. Calhoun's will: "Should I at any time collect the aforesaid "bond and mortgage debt, or any part of it, *or should Fort* "*Hill be purchased with it* or the money be invested in any "property or be retained in hand *the property thus purchased*, "the property thus obtained by investment, or the money "thus retained, *shall be considered and held to be in the place of* "*and the same as the aforesaid bond and mortgage*, and shall "pass under this codicil as if the same were in the form of "said bond and mortgage." (Record F, 46.) The Fort Hill place was purchased with the bond and mortgage, and is, therefore, to be treated as personalty.

Let us now see what Mrs. Clemson took under her mother's will. She took three-fourths of the bond and mortgage, for life, with the power and authority, by a last and testament duly executed, to dispose of it as she pleased. (Rec. F, 45.)

She thus had the power of appointment over it, and she had more; it was a power coupled with an interest. "A "power coupled with an interest means coupled with an "interest in the property which is subject to the power." Hunt v. Rousmanier, 8 Wheat., 174.

Although there was a trustee appointed by Mrs. Calhoun to hold this property, for that was necessary under the law of South Carolina relating to married women, still Mrs. Clemson had the right to sell the property, to direct the investment of the proceeds in other property, with the consent of the trustee to change the investment when she saw fit, and the right to change the trustee as often as she desired to do so. She therefore, for all practical purposes, owned and controlled the property as absolutely as if there had been no trustee; for if her trustee withheld his consent to any sale or investment she could remove him.

Mrs. Clemson was a married woman and the law, both in England and this country, has more liberally construed the efforts to execute a power of appointment, by this class than by any other.

In Curtis v. Kendrick, 9 Simons, 444, a married woman had a power of appointment, under a marriage settlement, and made the following will: I, Anna C. W. Martin, do hereby make my last will and testament, and do give and bequeath to my dearly beloved husband, R. F. W. Martin, all the property of which I am possessed, whether real or personal, &c. The Barons of the Court of Exchequer held that the testament was a due execution of the power given her by the marriage settlement. Again in Churchhill v. Dibben, 9 Simons *447, where a married woman had a power of appointment under a marriage settlement, but in disposing of the property by her will she made no reference to the power, still it was held as a proper execution thereof. And in the same case it was held that a "bequest of all my "goods and chattels, estate and estates whatsoever" passed real as well as personal property. Also in Porcher v. Daniel, 13 Rich., Eq., (So. Ca.) 349, it is decided "where a "married woman has the power under her settlement to "dispose of her property as she sees fit, it is not necessary "that in disposing of it she should refer to the power." As to married women all that the courts require is evidence that she attempted to execute the power, and equity will aid in a defective execution. See also Lewin on trusts—§21 *695.

We will now discuss what is necessary under the authorities to make a valid and effectual exercise of a power of appointment, and shall maintain that Mrs. Clemson's will was a full and complete exercise of such power, whether tried by the rigid and unbending rules of the old English cases or by the subsequent statutes, 7 Wm. IV., and 1 Vic., c 26, or by the more equitable and just standard adopted by the United States and State Courts.

The old English rule

is probably more clearly stated in the leading case of Doe d. of Nowell v. Roake, the Common Pleas hearing of which is reported 9 Eng., C. L., 476; thence it was carried by writ of error to King's Bench, and is found in 11 Eng., C. L., 476, whence it went to the House of Lords, and is reported in 19 Eng., C. L., 139. The rule then laid down is: "In no in- "stance has a power or authority been considered as exe- "cuted unless by some reference to the power or authority; "or to the property which was the subject of it; or unless "the provision made by the person entrusted with the "power would have been ineffectual." Mrs. Clemson in her will, refers distinctly to the power under which she acts, in two places. First, where she says: "Whereas I am en- "titled to legacies under the last will of my deceased "mother." Secondly, when she says: "And notwithstand- "ing my coverture have full testamentary power to dispose "of the same." That is the source of the power, the only one mentioned. The will was executed in 1871, and she could have disposed of any property held absolutely by her, without making a will, i. e., could have deeded, sold or given it away. but this property was held by her under her mother's will and that limited her disposition of it by will alone. Therefore she says *testamentary power*. She must have referred to the power given her in that will, or else the words "notwithstanding my coverture have full *testa-* "*mentary power to dispose of the same*" would be meaningless and absurd.

She refers to the property also. In her will she says: "I "am entitled to legacies under the last will of my mother." Her mother in her will spoke of Anna's property as "lega- "cies." And Mrs. Clemson, in appointing a new trustee for this same property, within three months after making her will, uses these words: "Entitled to considerable *lega-* "*cies*, the legal title of which is, by the will, vested in Ed- "ward Noble," and proceeds to appoint her husband, Thomas G. Clemson, "as trustee, under the will, for the

"property therein bequeathed to me and also for the prop-
"erty bequeathed to me in the codicil." Hence it was as clearly a reference to the property as if she had said: "My "three-fourth's interest in the bond and mortgage on A. P. "Calhoun," instead of "the entire *property* and *estate* to "which I am now in any wise entitled * * * of whatever "the same may consist." "*Id certum est quod certum reddi "potest.*" The reference was to the legacies under her mother's will and by examining that will we have a full description of the property, for where reference is made in one paper to another, the two will be construed together. Jarm. on W., 358. As was held in Johnson v. Clarkson, 3 Rich., Eq., (So. Ca.) 305, "a paper referred to in a will or de-
"scribed so that there can be no doubt as to its identity, "becomes a part of the will."

Now let us read Mrs. Clemson's will by supplying the words from the paper referred to and it reads thus: Whereas, I am entitled to legacies under the last will of my deceased mother, Floride Calhoun, to wit: Three-fourths of the bond and mortgage on Fort Hill, and which I have full testamentary power to dispose of notwithstanding my coverture to wit: I am authorized and empowered by my last will and testament, duly executed, to dispose of this bequest as I please. Now * * * I will, devise and bequeath the entire property and estate, to which I am now in any wise entitled, and which I may hereafter acquire, of whatever the same may consist, to my beloved husband, Thomas G. Clemson, absolutely and in fee simple. Thus we have a reference in Mrs. Clemson's will to the *power* which she proposes to exercise, and to the *property* over which she is exercising it; when a reference to either the one or the other, is held sufficient under Nowell v. Roake, supra. The will, however, is an execution of the power, under the third requirement laid down in Nowell v. Roake, for the provision made by the person entrusted with the power would be ineffectual unless the property derived from her mother passes thereby.

Mrs. Clemson in the introductory part of her will, defines

the sources of her property which she is about to dispose of, to wit: "I am entitled to legacies under the last will of "my mother, Floride Calhoun, and to a distributive share "in the several estates of my deceased sister, Cornelia Cal- "houn, and of my brother, Patrick Calhoun." The issue is: Did the will operate on the legacies derived under her mother's will? If that was all which passed under the will, and it would be inoperative, without affecting this, then it must be determined as an effectual execution of the power. The will takes effect at the death of the testator and speaks from that time. Mrs. Clemson died 27th September, 1875. Let us examine what there was of Mrs. Clemson's interest in the estate of her brother, Patrick Calhoun. On 13th April, 1860, letters of administration were granted to Edward Noble, on this estate, which consisted of three unsecured notes on A. P. Calhoun, and $3.00 in cash. On the 28th August, 1877, the administrator made his final return, "showing that the distributive share of each heir in the "estate was $120.49." That on the 2nd day of May, 1875, he paid Mrs. Anna C. Clemson $150.00. So we see that there was not only nothing coming to Mrs. Clemson at the time the will took effect, but that she had then overpaid $29.51. (Ad Rec. Ff. 31, 32, 33 and 34. Let us see how the estate stood, that of her sister Cornelia. Letters of administration were granted to Thomas G. Clemson on this estate 13th March, 1866. (Ad Rec. F 35. The share of each distributee was $403.37. (Ad. Rec. F 8.) This Mrs. Clemson received in January, 1872. (Ad. Rec. F 7.) So we see that there was nothing from this estate for her will to operate on. Mrs. Clemson having received her full share in these estates after her will was made and before her death, they were adeemed, and can not be considered further. Smith's Lead., Cas. 376, and authorities there cited. Besides we have ample testimony showing that Mrs. Clemson had no other property at the time of her death, except that derived from her mother's will. See testimony of Mrs. Catherine D. Cornish, her nearest friend, (Ad. Rec. F 57), Dr. Thos. J. Pickens, her famlly physician and kinsman, (F 52), J. Miles

Pickens, her kinsman and neighbor, (F 54.) It was urged on Circuit, however, that the will would operate on a valuable portrait which her mother had given her, in a different clause of the will from that giving her a three fourth's interest in the bond and mortgage. We submit that she would hardly have made a will to dispose of her mother's portrait alone, and had she done so she would not have described it as "legacies" or as "the entire property and estate "to which I am now in any wise entitled, and which I may "hereafter acquire, of whatever the same may consist." Besides, being a married woman when she received this portrait, and it having been reduced to possession her husband's marital rights attached and it became Mr. Clemson's absolutely.

The modified English rule

was adopted on account of the narrowness of the construction given by the courts to efforts to exercise a power of appointment, even the courts themselves being dissatisfied, and feeling that great injustice was being done in the name of the Law. Lord Ch., Jus. Best in Roake v. Dunn, 4 Bligh, N. S., 22, says, "That rules with respect to evidence "of intention are bad rules, and I trust that I shall live to "see them no longer binding on the judges," and Sir Wm. Grant in the case of Jones v. Tucker, 2 Mer., 533, went so far as to declare that while the execution of the power (in that case) seemed complete in his private opinion, still he could not judicially declare it executed. And Lord Elden in Narnock v. Horton, said: "I am not sure it (the rule) does ~~have been~~ the court to act against what probably might ~~not oblige~~ the intention nine times out of ten."

not obliged have been

In consequence of this dissatisfaction, both on and off the bench, at the failure to decide this class of cases pursuant to the intention of the party executing the power, the Statues of 7 William IV., and 1 Vict., c 26, §27, were enacted, which declare that a general devise of real or personal estate, in a will, should operate as an execution of a power of appointment of testator over the same, unless a contrary intention should appeal from the will.

Judge Story says that under this statute the doctrine has settled down to what seems to be the dictates of common sense, unaffected by technical niceties. A good many of our States have followed this rule, notably Massachusetts, North Carolina, New York, Illinois.

See Willard v. Ware, 10 Allen, 260; Armory v. Meredith, 7 Allen, 397; Bangs v. Smith. 98 Mass., 270.

Tried by this rule, there can be no question but that Mrs. Clemson's will is a valid execution of the power, for there is a general devise of real or personal property, and no intention *not to include* the property over which the appointment exists in the will. "I will, devise and bequeath *the* "*entire property* and *estate* to *which* I am now in *any wise* en- "titled, and which I may hereafter acquire, of whatever the "same may consist." If Mrs. Clemson had had this rule before her at the time she drew the will she could not have more effectually carried out its provisions. She does not define it as my property or my estate or my inheritance, but she says *the entire property and estate*; and as if fearful that it might be construed to mean her individual property, she adds "of *whatever* the same may consist." It would be impossible to frame a sentence which would cover more absolutely every interest which one possessed than this one does.

The rule in U. S. Courts,

in determining what is a valid execution of a power, is that if the intention of the donee is to execute, whether manifested directly or indirectly, positively or by just implication, the execution shall be valid and operative, and especially is that the case where the execution is by will.

The leading case in this country is Blagge v. Miles, 1 Story, Eq., 445, decided by Judge Story. After stating that in the construction of wills, the intention of the testator shall govern, he continues: "Similar doctrines now prevail "in regard to the execution of powers, and especially in "regard to their execution by last wills and testaments. "The main point is to arrive at the intention and object of "the donee of the power, in the instrument of execution,

"and that being once ascertained, effect is given it accord-
"ingly. * * * If the donee intends to execute and the
"mode be in other respects unexceptionable, the intention
"however manifested, whether directly or indirectly, posi-
"tively or by just implication, will make the execution valid
"and operative. * * * All the authorities agree that it
"is not necessary that the intention to execute the power
"should appear by express terms or recitals in the instru-
"ment. It is sufficient that it should appear by words, acts
"or deeds demonstrating the intention." In Warner v. Con. Mutual Ins. Co., 109 U. S., 364, it was contended that as the agreement under consideration makes no reference to the power or the property of testatrix, which is the subject of the power, and that as every provision contained in it can have its full operation and effect, that there was a failure to exercise the right of appointment. The court held that notwithstanding there was no mention of the power or the property; taking the instrument in all its parts the intention to execute the power was apparent, and as that intention could not take effect except by virtue of the power, it was therefore a valid execution. This case contains an exhaustive review of the English and American authorities, and copious citations from Sugden on Powers, Chance on Powers, and like, books of authority.

Mr. Justice Strong, in delivering the opinion in Blake v. Hawkins, 98 U. S., 326, puts the rule of the U. S. Court very clearly and succinctly, as follows: "If the will contain no "intent to exert the power, yet if it may be reasonably gath-
"ered from the gifts and directions made, that the purpose
"and object were to exert it, the will must be regarded as
"an execution. * *" In Warner v. Howell, 3 Wash., c c, 14, it is held, "the leaning of the court is strongly in favor
"of the execution of the power if it can be supported."

Then what was Mrs. Clemson's *intention?* Clearly that her husband should inherit everything which she possessed, her "*entire property and estate,* in which I am now in *any wise*
"*entitled,* * * of *whatever the same may consist.*" It may enable us more clearly to discover her intention by a simple

transposition of the words: I, Anna C. Clemson, will, devise and bequeath my entire property and estate, consisting of legacies under the last will of my deceased mother, Floride Calhoun, * * to Thomas G. Clemson, absolutely and in fee simple; having full testamentary power to dispose of the same, notwithstanding my coverture. The same words are used—simply their arrangement is changed. Yet the *intention* is manifest to the most casual observer, and the reference both to the power and the property is clear.

The rule in the State Courts

can probably be best discovered by a reference to a few of the fullest and most quoted authorities. In our opinion the clearest and most equitable decision to be found on this subject in any of the books is that of Sewall v. Wilmer, 132 Mass., 134, in which Chief Justice Gray says: "But in this "commonwealth the decisions in England since our revo- "lution and before the Statutes of 7 William IV. and 1 "Vict., c 26, §27, have not been followed. The Court has "leaned toward the adoption of the rule enacted by that "statute as to wills thereafter made, that a general devise "or bequest should be construed to include real or personal "estate, of which the testator has a general power of ap- "pointment, unless a contrary intention should appear by "his will, and it has been adjudged that the mere fact that "the will relied on as an execution of the power, does not "refer to the power or designate the property subject to it, "and that the donee of the property has other property of "his own upon which the will may operate, are not conclu- "sive against the execution of the power; but that the "question in every case *is a question of the intention of the "donee of the power*, taking into consideration *not only the "terms of the will, but the circumstances surrounding him at "the time of its execution, such as the source of the power, "the terms of the instrument creating it and the extent of his "present or past interest in the property subject to it.*" That is justice and common sense. If it is law, there can not be

a reasonable doubt but that Mrs. Clemson's will is a valid execution.

Mrs. Clemson had no other property; she wanted her husband to have all she had; she had as unlimited control over this property as if it had been devised to her absolutely and in fee simple; she and her husband had been living on the place for years. They had agreed to make mutual wills for each other's benefit and her most ardent wish after the death of her children that this property should go towards the establishment of a mechanical and agricultural college could only be effectuated by her will operating on this property, and passing it to Mr. Clemson.

In the case of Funk v. Eggleston, 92 Ills., 515, an elaborate and careful resume of the authorities is made, and it concludes that the concensus of American opinion is not only that the older English cases should not be followed, but that the decisions under the statutes are not broad enough, and concludes that the true test is as laid down by Judge Story in Blagge v. Miles.

To same effect see Postlethwaite's Appeal, 68 Pa., State 381; White v. Hicks, 33 N. Y., 383; Munson v. Berdan, 8 Stewart, (N. J.) 376.

The rule in South Carolina

it is claimed is different from that obtaining in the United States Courts and all the other State Courts. Indeed it is claimed to be as rigid here now as that which existed in England prior to the enactments of 7 Wm. IV. and 1 Vic., but an examination of the cases on the subject which have been passed upon by our court will not justify this position. Indeed our construction of these decisions is that Blagge v. Miles has been adopted. Let us turn, however, to the cases. In Porcher v. Daniel, 13 Rich., Eq., 349, it is held that where a married woman has the power under her settlement to dispose of her property as she sees fit, it is not necessary that in disposing of it she should refer to the power. In Hopkins v. Mazyck, Rich. Ch. cases, 269, the words used were: "The residue of my estate real and personal, what-

"soever and wheresoever, including any estate real or per-
"sonal not hereinbefore particularly devised and bequeathed
"which I have derived under the will of my father." The father of the testator had left certain property to trustees in trust for his son, during his life, with a power of appointment. The son left considerable property which belonged to him absolutely besides that which he held the power of appointment over. The court decided that "the *intention* to "execute the power of appointment, by devising the whole "estate in the land, is most obvious," and that the intention as gathered from the will must prevail, and the power was held to be duly executed.

In Boyd v. Satterwhite, 10 S. C., 54, she owned one-half interest in a tract of land absolutely, and she had a power of appointment over the other half. The words used were: "The tract of land as far as I may have my legal interest." The court held that this was a reference to the property, and that there being evidence of an intention to convey that these words were sufficient to pass the land over which the power of appointment existed.

Bilderback v. Boyce, 14 S. C., 538, which is so much relied upon by the plaintiff in this case, we regard as properly decided under the circumstances of that case, because as a matter of fact there was no reference to the power or to the property; the other property left by the testator was ample to satisfy the terms of the will in every particular, and the court could not from the circumstances surrounding the testator discover an intention to exercise the power of appointment over a certain piece of property. But the court distinctly recognizes Blagge v. Miles as authority, and quotes from it, approvingly, the principle which this defendant rests his case on, to-wit, that "the authorities on "this subject may not be easily reconcilable with each other "but the principle furnished by them, however occasionally "misapplied, is never departed from, that if the *donee of the* "*power intends* to execute the power, that *intention, however* "*manifested*, whether directly or indirectly, positively or by "just implication, will make the execution valid and opera-

"tive." In the later case of Moody v. Tedder, 16 S. C., 563, the court says: "The words used are *'all my interest "and life estate.'"* No reference in terms is made to the power of disposing, but besides the life estate, she had no other interest in the property, and there is express reference to the property as to which the power existed "in and "to all and singular the land, negroes, &c., left to me for "life by the last will and testament of William Griggs, de- "ceased." It may be true that the word "interest" was not the technical term to express the idea of a power, but in the ordinary acceptation of the word, it is broad enough to cover it, and we think the deed was intended to include the power. The question of the execution of a power is always one of intention, "and if the deviser of the power intends "to execute it, that intention, however manifested, whether "directly or indirectly, positively or by just implication, will "make the execution valid and operative." This is the latest case in South Carolina In that case the words "all "my interest and life estate in and to all and singular the "lands, negroes, horses, cattle, hogs and other property left "to me for life by the last will and testament of William "Griggs," &c., was held a sufficient expression of intention to carry not only her life interest, but the absolute estate, under a power of appointment. Then surely the words, "Whereas I am entitled to legacies under the last "will of my deceased mother, * * I will, devise and be- "queath *the entire property and estate* to which I am in *any* "*wise entitled* * * *of whatever the same may consist*" would be held a sufficient execution of the power under the laws of South Carolina.

The position occupied by the testator, condition of his family, amount and character of his property and all attending circumstances must be taken into consideration in determining whether there was an intention to execute the power of appointment. Blake v. Hawkins, supra, decides: "It is a common remark "that when interpreting a will the attending circumstances "of the testator, such as the condition of his family, the "amount and character of his property, may and ought to

"be taken into consideration. The interpreter may place "himself in the position occupied by the testator when he "made the will and from that standpoint discover what was "intended."

In Scaife vs. Thompson, 15 S. C., 368, our court says: "In ascertaining the subject of testator's disposition the "court may inquire into the situation of the estate and into "every material fact which is auxiliary to the just interpre- "tation of his words, for the purpose of identifying the "thing intended by the words employed." Again in Clark v. Clark, in 19 S. C., 348, the court says: "In the construc- "tion of a will of course the main object should be to ascertain "the intention of the testator, but that intention must be "gathered from the will itself, assisted by the light of the "circumstances surrounding the testator at the time of its "execution." In Bilderbach v. Boyce, *supra*, the court, in in discussing the modifications of the English rule by the courts in this country, says: "These modifications for the "most part are upon the point of allowing proof of the cir- "cumstances under which the will was executed, so as to "allow it to be read in the light of those circumstances." To the same effect is 1 Sugden on P., 371; Farwell on P., 155; Postlethwaite's Appeal, 68 Pa. St., 381, 477; Brown v. Thorndike, 15 Pick., 387; Smith v. Bell, 6 Peters, 68.

And in Addison v. Addison, 9 Rich., Eq., (So. Ca.) 66, the court goes even further than any of these, and holds: "We "may look to the state of things at the making of the will "to ascertain the intention of the testator, and although "with much caution, (2 Jarm., 71) to *subsequent events*, as ex- "hibiting what was probable and probably contemplated by "the testator at the time of the devise, and we may give to "the same words different interpretations, under different "circumstances, in fulfillment of the same general inten- "tion of the testator."

What were the circumstances surrounding Mrs. Clemson, the condition of her family, amount and character of her property, object that she had in view, and what subsequent events took place, showing that her will must have been

intended as an execution of her power of appointment over Fort Hill? Her father and mother were dead, all her brothers and sisters dead or moved out of the State. Her son, Calhoun Clemson, a magnificent specimen of manhood, had just been suddenly snatched from her by a railway accident, as he was first entering life, full of hope and usefulness. Within two weeks thereafter her only remaining child, Mrs. Lee, had suddenly died. These bereavements came on her in August, 1871, and in September, 1871, she made this will. There was none of her immediate family left except her husband. Was it natural, was it reasonable, was it probable, that under these circumstances she would give him what she had? Would it not have been most unnatural, unreasonable and improbable that she should have done anything else? We find from the testimony that there had existed in her mind for years an ardent desire that Fort Hill, the home of her illustrious father, John C. Calhoun, should eventually become the site of an agricultural and mechanical college. No doubt this desire was crystalized by the death of her son, and as is testified by the witnesses, she and Mr Clemson made mutual wills, so that at the death of the survivor this property might be dedicated to that purpose. This could not have been done had the place gone to any one else, and her will must, therefore, have been intended as a transfer of this identical property. Especially must that be the case when we have seen from her own statement in her will, by the testimony of her friends and neighbors, and from the returns in the Probate office, that the only property which she had was that derived from her mother's will.

Effect must be given to every word and clause in a will.

This principle of construction is so well recognized that it is scarcely necessary to adduce authority to sustain it. In Ladd v. Ladd, 8 Howard, 58, it is said: "By every sound "rule of construction, an instrument should be interpreted "by the context, so as if possible to give a sensible meaning "and effect to all its provisions, and so as to avoid render- "ing portions of it contradictory and inoperative by giving

"effect to some clauses to the exclusion of others." See also In Re Teape's Trusts, 6 Eng. Rep., 801.

Applying this rule, we find that Mrs. Clemson speaks of legacies, using the plural, so she must have meant to convey not only the picture but the three-fourths of the bond and mortgage. "Testamentary power to dispose of" means, we submit, power to dispose of by will, not legal capacity. Bouvier defines testamentary—"belonging to a testament, "as a testamentary gift, a testamentary guardian or one ap- "pointed by will or testament." If testamentary gift means something given by a testament, testamentary power must mean a power given by a testament, and if a testamentary guardian means a guardian appointed by a will, testamentary power must mean a power appointed by a will.

Webster defines Testamentary—pertaining to a will or wills, bequeathed by will, given by testament or will. Testamentary power, therefore, must mean a power bequeathed or given by a will.

We respectfully submit in conclusion that Mrs. Clemson's will and the additional proof shows: 1. That the power was referred to. 2. That the property was referred to. 3. That the will would be inoperative and meaningless unless effect was given to her power of appointment. 4. That gathering the intention from the whole instrument, it was an execution of such power. 5. That aided by the circumstances surrounding the testatrix, that the execution of the power was not only her intention, but principle purpose in making the will. 6. That all the words and phrases can only be given their legitimate meaning by holding that the power was executed; and, 7. In the words of Chief Justice Fuller, "the intent to dispose of all the estate, here, is ap- "parent on the face of the will, and as the will plainly "refers to the property covered by the power, its words can "not be satisfied unless the instrument operates as an exe- "cution of the power."

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